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The Anti-Trust Laws of the United States

The Annals

VOLUME CXLVII JANUARY, 1930

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PART IV. WHAT OF THE FUTURE?

FOREWORD

IN recent years the anti-trust laws of the United States have been praised, condemned and amended more than any other one piece of Federal legislation. Some regard them as the bulwark of industrial liberties, while others see them as a Procrustean bed to which only Labor is required to conform. It is generally agreed that they rank next to the Eighteenth Amendment and tax reduction as legal topics of every-day conversation, and that proposed future changes give promise of increased popular attention because of the recent expansion in corporate stock ownership.

Wise future legislation must be predicated, not only upon an accurate knowledge of the present law, but also upon a clear conception of the precise changes which are necessary. Furthermore, it is essential that adequate and proper governmental machinery be provided for the enforcement of the law because enactments which are praiseworthy in substance may be vitiated by the enforcing agency. This volume is not a mere legal invoice of the present status of the law: it represents an attempt to acquaint the reading public with the practical operation of the law, to evaluate it, and to indicate some of the changes which may be expected in the future.

The editor desires to acknowledge his indebtedness to Mr. Edward W. Carter, a colleague in the Wharton School of Finance and Commerce, for valuable assistance in preparing the volume.

JOHN G. HERVEY.

The Changing Economic Order[1]

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In considering in what respects social organization can change, does change and is controllable by man in its changing, it has become customary to speak of four possible fields or areas of change: man's biological nature, the natural environment, the physical elements of culture and the non-physical elements of culture.

With respect to the biological qualities and abilities of man, we have become accustomed to recognize that in this field no essential change has occurred for at least fifty thousand years, and perhaps for a very much longer period of time. At least fifty thousand years ago man was able to stand erect; his free hand with its apposite thumb was usable as a tool-grasping and later a tool-making member; his voice box had apparently its present-day plasticity; his muscular powers were, if anything, greater than our own; the quality of his brain cells—his native brain power—was apparently the equal of our own. Since no essential changes have taken place in man's biological make-up in the last fifty thousand years or more we have come to think of this element as unchanging, as a fixed datum.

So also we have come to regard man's natural environment as unchanging. It may, of course, be that after countless eons of time this universe will "run down." Occasionally, of course, catastrophic happenings have resulted, and will in the future continue to result, in more or less significant modifications of the natural environment. There is, of course, the possibility of the exhaustion of certain natural resources. But in the main the resources and powers of nature have come to be thought of as an unchanging element, as another fixed datum.

If, then, there has been upon this earth approximately the same kind of biological man for the last fifty thousand years or more, and if for an even longer period of time there have been substantially no changes in natural resources and powers, it follows that the great difference in man's status today as compared with his status of fifty thousand years ago is to be ascribed to that human product, that factor which man himself has brought into being—culture.

In terms of physical culture—the material impedimenta of civilization—vast changes have certainly occurred. Neanderthal man of fifty thousand years ago had nothing in the way of tools except such sticks and stones as he might crudely fashion to his needs. In the way of clothing and shelter he had apparently only such devices as he could appropriate, with little alteration, from nature. He may or may not have been able to make fire; he certainly knew how to keep fire. In fine, in this *appropriative stage* of his culture, man was able merely to appropriate, without substantial change, the physical goods furnished by Nature. Forty thousand years later Neolithic man had progressed to the stage of making many kinds of tools of stone and wood; to the stage of domesticated animals, agriculture, woven goods and pottery; to the

[1] Address, October 23, 1929, before the Institute of Government and Politics, arranged by the Pennsylvania League of Women Voters and the University of Pennsylvania.

stage of definitely fashioning clothing and shelter. He had reached the *adaptive stage* of man's development. Today man is in the *creative stage* of his development. He fashions substances not found in nature at all, and the physical impedimenta of civilization are as superior to those of Neolithic man as they in their turn were superior to those of Neanderthal man.

Although changes in the non-physical elements of culture cannot be measured in definite objective terms, it is a matter of common knowledge that vast changes can occur and do occur in this field. Speech develops into writing and into printing. Trial and error rule-of-thumb knowledge develops into scientific knowledge. Governmental structures change from the patriarchate and the matriarchate to the modern democracy. Corresponding changes occur in the realms of religion, of the family, of economic institutions, of educational institutions, to cite only a few of the many changing features of our non-physical culture.

OUR MATERIAL PROGRESS

A somewhat detailed consideration of a few of the outstanding aspects of our physical culture will demonstrate not only how vast the changes have been in this field, but also how rapidly the rate of change is increasing today. As representative of the whole vast field of physical culture, let us look briefly at such homely matters as light, heat, food, the metals, mechanical powers and means of communication and transportation.

As regards artificial light, man of fifty thousand years ago had only the light of his fires. By Neolithic times this had been supplemented by crude oil lamps, and later candles of various sorts became available. But it was not until about 1800 that the circular wick and the lamp chimney became available; it was not until about 1800 that gas became available for lighting purposes; it was not until 1827–1833 that the friction match was invented; not until about 1850 that kerosene came into use; not until 1879 that the incandescent light became available. If one were to paint the picture with a broad brush, the history of artificial light might be summed up thus: five hundred thousand years of no light or at the best wretched light, one hundred years of moderately good light, one generation of really good light.

As regards heating systems and refrigerating systems, much the same story may be told. Probably there were not even chimneys in England prior to 1200, while our own Benjamin Franklin as recently as 1744 invented the type of stove which could stand out in the room and thus utilize a fair percentage of the energy of fuel. It was not until the nineteenth century that central heating systems were feasible, and not until the last quarter of the nineteenth century that thoroughly effective heating systems and, later, refrigerating systems became available. Five hundred thousand years of no artificial heat or at the best wretched heat, one century of moderately good heating devices, one generation of really effective heating and refrigerating devices.

As regards food supply, both the production of food and its preservation might properly be surveyed, but we shall confine our attention to food preservation. Neolithic man knew how to preserve his food by storing the dry grains, by drying meat and by leaving a layer of cold grease over cooked meats. Such primitive devices had to suffice until after the opening of the nineteenth century. Napoleon, in need of portable food supplies for his armies, stimulated the development of the canning of foods. The canning of foods remained, however, a haphazard, uncertain, rule-of-thumb operation until after the great work of Pasteur in the 1880's. From that time on, it gradually became clear that the harmful action of bacteria in foods could be checked by refrigeration, by sterilization and by desiccation. In the twentieth century these methods have been coming to full fruition in our food industries. Five hundred thousand years of no control or at the best wretched control of food supplies, one hundred years of moderately effective control of food supplies, one generation of really effective control.

The same story may be told of man's control of metals. Neolithic man had to depend upon bone, stone and wood for his brittle tools. A matter of eight thousand years ago man began to control metals, but it was not until about 1750 that a really effective blast furnace came into use; not until after the 1850's (really after the 1880's) that the Bessemer and open-hearth processes made it possible to have the plentiful steel which has transformed transportation, construction, manufacture and the many other varied producing activities. The amount of metal produced in the world four or five hundred years ago would make a wall eight feet high and six feet broad extending through three or four city blocks. The amount of iron produced today would make a similar wall reaching from Chicago to New York and on several hundred miles into the Atlantic Ocean. As regards metals it is substantially true to say that we have had five hundred thousand years of no metals or at the best little in the way of metals, one hundred years of moderately plentiful metals, one generation of really effective command of metals.

A similar story may be told of our devices for controlling mechanical powers. Neanderthal man had command of practically no powers outside those of his own body. Neolithic man could command the power of springy wood. He had also domesticated animals and he could make some use of wind power through sails. But it was not until 1764–1782 that the steam engine became a practical instrument; not until the middle of the nineteenth century that the compound engine and the turbine engine became available; not until 1867 that the gas engine was effective; not until 1873 that the electric motor was invented. How slowly these devices were introduced in their earlier period may be seen from the fact that it was not until 1880 that the horse power of steam engines used in our factories exceeded the horse power of water wheels so used. Today, however, we have something like a billion horse power in mechanical devices in the United States—something like eighty mechanical slaves for every man, woman and child of our population. Five hundred thousand years of almost no devices for harnessing the mechanical powers of Nature, one hundred years of the beginnings of such devices, one generation of really effective and plentiful devices.

The same story may be told of our devices for transportation and communication. One hundred years ago an English statesman who needed to go from London to Rome could make no better time than Julius Caesar, and Caesar could have made no better time than a Neolithic savage, except for the good Roman roads. Almost within the last hundred years steam has been applied to rail and water transportation. As recently as 1896 there were only four gas-driven automobiles in the United States. The first experimental flights of airplanes occurred in 1903 and 1905; the first telegraph chattered in 1844; the first telephone stuttered in 1876; the modern wireless dates rough-

ly from the beginning of the twentieth century. Five hundred thousand years of wretched communication and transportation, one century of moderately good transportation and communication, one generation of really effective and plentiful devices in this field.

NEWNESS OF PHYSICAL CULTURE

The striking newness of the essential features of our physical culture may be stated another way, the device being borrowed from the writings of Robinson.

If we assume that the human race began to occupy the earth twelve hours ago, at least eleven of these twelve hours dragged by shrouded in silence and mystery. We have no exact knowledge of what happened in that vast stretch of time. The reasonable inference is that man consumed these slow ages in rising to a stage of development below that of the lowest living savage. Something like an hour ago, measured on the scale that we have assumed, man had become able to leave here and there for our later discovery exceedingly crude hand-tools of stone, and he left in his caves the cold embers of his fires. He had become a fire-user. It was not until twenty minutes ago (remember that eleven hours and forty minutes have gone by) that a few groups scattered here and there over the surface of the earth had become able to domesticate animals, crudely cultivate the soil, weave rough cloth, make unglazed pottery and shape tools of polished stone or bone. A matter of fifteen minutes ago man learned to use the metals. Then he could greatly improve the meager implements with which he wrestled with Nature or warred with other groups. Ten minutes ago he wrote. He wrote crudely and insufficiently, but he was at least able to transmit messages more accurately than memory could serve and thus to begin to heap the exact knowledge that could in time become scientific knowledge. Three minutes ago Greek philosophy, art and science were given to the world. Less than three minutes ago Roman engineers and administrators ruled the known world, and the founder of the Christian religion was born. Only one minute ago began those great changes in medieval life and culture from which we date the beginnings of modern life. Forty seconds ago, Gutenberg invented movable type and the printing press. Nine seconds ago man, with much fear and trepidation, risked his neck traveling upon the first crude steam railway at a rate of fifteen miles per hour. Five seconds ago the first telephone stuttered. As for the airplane and the wireless we have had them but for two ticks of a grandfather's clock. What a strange record it is! One hour ago man, with almost no background of physical culture, cowered in trees and caves, trembling at the sound of the huge animal life which surged and crashed around him. One minute ago he began to get substantial control of the forces of Nature. For one second he has lived in the midst of a really abundant physical culture.

Admittedly, the foregoing sketch of the development of man's physical culture has been painted with a broad brush and is lacking in fine lines and distinctions. Notwithstanding inevitable inaccuracies in such a method of statement, it remains broadly true that the changes which have occurred in the various parts of our physical culture have been synchronized in a striking way. The reason for this synchronization is not far to seek. It is related to the development of science and technology.

As compared with trial and error rule-of-thumb knowledge, scientific knowledge has two striking advantages. In the first place, it is measured, tested, accurate knowledge which is quite dependable; it can be built upon with a high degree of safety and certainty. In the second place, whereas rule-of-thumb knowledge is applicable to but one or at the most to but a few situations, scientific knowledge is commonly stated in far-reaching generalizations—in the so-called laws of science—which have multitudinous applications. When we bear in mind these two striking advantages of scientific knowledge, when we reflect upon the place which scientific research now holds in our civilization, when we further reflect upon the many kinds of schools of technology which have been developed to apply scientific knowledge to the arts of life, and, finally, when we reflect that only in the last few hundred years has this scientific knowledge become available and only in the last two generations has it been applied in large measure to the arts of life, then it becomes evident why our physical culture has changed so rapidly in the last two generations.

Vastly more important, however, is the significance of this science and technology as means of affecting the future rate of change in our physical culture. As Walter Lippmann has well pointed out, the significant fact is this: Man has achieved the *invention of invention*. He has *discovered a method of discovery*. This (in striking contrast to what was true in earlier states of culture) places at man's command the means with which he may veritably *multiply* and not merely *add to* his achievements. It is by no means incredible that all the splendid achievements of the past are but trifling as compared with what will happen in the next second of man's existence, as measured on our imaginary clock.

NON-PHYSICAL CULTURE

It goes without saying that the changes which have occurred in our physical culture have had, and will continue to have, profound repercussions upon all aspects of our non-physical culture. The area opened up by this statement is so vast that it must suffice if we draw upon only three or four illustrations.

Take, for example, the changing situation with respect to the relationships of labor, capital and management. It has become a commonplace of our thinking that the coming in of the new régime, and especially the coming in of the power-driven machine, has profoundly affected the position of the laborer. It has resulted in his being divorced from the ownership of his tools, divorced from control of conditions of labor and divorced from the ownership of the product. The wage system—the work contract system—has become the characteristic device for the utilization of labor in our economic order. But how rapidly our outlooks on the position of labor change! Already such considerations as have just been sketched—considerations which point toward a conflict of labor and capital and toward remedial action to remove the "disadvantages" of labor—begin to have something of the odor of faded rose leaves. Already the industrial situation is demanding a newer outlook—one which emphasizes coöperation between labor and capital. And if one keeps in mind that man's "discovery of a method of discovery" seems likely to cause the cultural changes of the immediate future to be vastly greater than even the changes of the near past, one wonders whether an entirely new set of relationships between labor and capital may not be in the process of formation. May it be that the whole economic order is changing before our

very eyes? This has happened in the past. The time was when the medieval craftsman—the technical man—held the strategic position, and the organization of industry and the legal framework of industry revolved around his position. With the coming in of the power-driven machine and the need of ever larger supplies of capital, the capitalist became a more important figure and in time the organization of industry and the legal framework of industry revolved around his position. Can it be that physical productivity has reached such a stage that the relative importance of capital goods will wane at the same time that the increasing complexity and interdependence of industry will emphasize the importance of management? Can it be that management (whatever this word may come to mean in the future) is to take the position once held by the craftsman and later by the capitalist? May it be that the future will see unions of laborers coöperating with unions of capitalists against management? That is, of course, an extreme way of putting the case, but there are persons who believe that just such bizarre changes are in process.

But it is not by any means solely within the field of the relationships of labor, capital and management that we find ourselves plunged into the unknown—a bewildering unknown that in our present state of knowledge sometimes seems almost an unknowable. Take, as another example, that basic assumption of our economic order, individual initiative. Our economic order has been developed primarily upon the assumption that the individual, and not the organized group or society, is to be relied upon for initiating our economic enterprises, for managing and guiding our business units, for dividing the social product among the members of society, for most of the really significant functions in an economic order. Individual initiative, working through the institutions of private property and pecuniary competition, may fairly be said to be our fundamental organizing device.

ESTABLISHMENT OF A "SOCIAL MINIMUM"

Notwithstanding the many admitted difficulties of such a scheme of social organization, there can be no serious doubt that its use has been attended by tremendous progress and productivity; and there can be no serious doubt that we must in the future continue to rely strongly upon this device. But equally there can be no doubt that the vast changes of the last second of man's existence—as measured upon our imaginary clock—have plunged the present-day individual into the midst of forces which he cannot fully understand and which he finds increasingly difficult to control. With what result? With the result that on every hand there are brought into use many devices designed to establish a "social minimum" which may serve as a basis or foundation of "sturdy individualism." In the field of labor, there is the minimum wage, regulation of hours and conditions of work, factory inspection, old age pensions, workmen's compensation, attempted regulation of unemployment and many other devices. It has become the fashion to think of these as "protecting" devices, as devices largely of a remedial character. But, is it not conceivable that while the motive was apparently one of securing protection and remedial action, there was really something more constructive in the situation? Is it not conceivable that without society's being aware of the fact there has come a dawning recognition that the individual in this new complex, interdependent, changing society of ours is, in fact, unable to exercise individual initiative of the type called for in our fundamental social theory? Is it not conceivable that society has been somewhat blindly groping toward the establishment of a social minimum which may serve as a basis for a sturdy individualism of the future?

Certain it is that this movement has not been confined to the field of labor; corresponding developments have taken place in the field of business enterprise and management. There are, for example, debtors' exemption laws in our various states, apparently designed to guarantee that a minimum of private property shall always be left an individual as a basis of starting his business over again. There are systems of vocational education, blue sky laws, schemes for the Government to supply all sorts of information about marketing methods, about stocks of goods on hand, about movement of commodities to market, about opportunities in foreign countries, to cite only a few. May these properly be called gropings toward the establishment of a social minimum in enterprise?

And may it not be that the so-called protective legislation applicable to the consumer (covering such widely divergent matters as public health and sanitation, educational opportunities, public parks and playgrounds, pure food and drug acts—and this is, of course, but the merest beginning of such a list) has also been motivated by the need of having a social minimum as a basis of individual initiative? It is at least thinkable that in all these and in other fields the many instances of "protection" and "remedial action" really represent a fumbling hither and yon (with as yet no explicit social policy guiding the fumbling), with the general drift in the direction of providing the social minimum which alone, so far as we can now see, can make possible the sturdy individualism that is to be needed for the future.

INCREASING GOVERNMENTAL CONTROL

A usual way of referring to such developments is to say that we are living in a régime of increasing governmental control—of increasing social control with particular reference to governmental control. That is, of course, true, and the reasons are not far to seek. We have become quite well convinced that the first fundamental assumption of the *laissez faire* régime is false. This first assumption, you will remember, was that every individual of sound mind and mature age knows reasonably well his own self-interest. While this may be said to have been substantially true of the simpler society of the past, the kaleidoscopic changes of the last generation have made it highly improbable that every individual can know his own self-interest even reasonably well. The second assumption of the *laissez faire* régime was that the individual will follow his self interest and in so doing will be led "as by an invisible hand" to promote the public welfare. This second assumption we can no longer grant; the last hundred years of history have furnished abundant evidence to the contrary. At the same time that we have lost our faith in the easy assumptions of the *laissez faire* régime, we have been beckoned in the direction of increasing governmental intervention by several considerations. One is the fact that the increasing size and increasing complexity of our society have meant a tremendous increase in the number of points of contact and, hence, in the number of points of possible conflict—conflicts which, in the very nature of the case, must be adjudicated. Then, too, we have come to be vastly more tolerant of governmental in-

tervention than was the case two hundred years ago. It was one thing to be suspicious of government when the government was that of a despotic king; it is quite anothing thing to be suspicious of government (and we still have ample ground for a new kind of suspicion) when government means the rule of the people. In the same period that our hostility to government has declined, increasing scientific knowledge and scientifically established standards have opened wide the opportunity for governmental intervention in such matters as the regulation of public health and sanitation, the setting of standards of building construction, the guaranty of purity of food supply, and so forth. Then, too, the coming in of the evolutionary philosophy has meant an acceptance of the view that change can occur in social organization and (by a natural step) an acceptance of the view that man can influence that change, governmental action being, of course, an important method of influencing the change.

For such reasons as these we have come to accept, either wisely or foolishly, an increasing amount of governmental intervention in the ordinary affairs of life; and it is commonly assumed that a still greater increase is to take place in the future. This may well prove to be the case, but there is little reason to suppose that governmental intervention will serve as an easy cure-all of our difficulties of social organization. Compare, if you will, the status of individual initiative and governmental intervention. In the past we have built our social organization upon the assumption of individual initiative; and such tremendous changes have occurred and such intricate and complex situations have emerged that the "individual" has been unable to measure up to his responsibilities. Have we any evidence that government as we know it today (it is operated by individuals, of a sort) will be competent to meet the strain that has proved too great for individual initiative? If our future is to live up to the promise of our past, may it not be that the next second of man's history must see a very great substitution of other forms of social control for governmental action? At the very least, may it not be that we must look in the direction of types of governmental control very different from anything that man has known or experienced in the past?

The relationships of labor, capital and management; the need of a social minimum as a basis of sturdy individualism; the opportunity for a more effective utilization of our various forms of social control—these are but three illustrations out of many of the new institutional situations which are emerging from the vast cultural changes of our generation. Although they are but three illustrations, they must serve our present purposes.

Thus far the argument has run that, as regards the changes and the rates of change in our social order, man's biological characteristics constitute a fixed datum, as do also nature's resources and powers. The argument has run that changes have been, and by implication will continue to be, primarily changes in man's culture with no considerable changes in the biological and natural environmental bases. Even with the lines of the argument thus restricted, it is clear that tremendous changes have occurred and it is probable that even more tremendous changes are a matter of the near future.

But is it safe to build the entire case on the assumption that the natural background and man's biological characteristics are unchanging and unchangeable?

MAN AND ENVIRONMENT UNCHANGEABLE?

As regards the assumption that the natural background is unchanging and unchangeable, one cannot avoid the suspicion that we have here a case where everything depends on how words and terms are used. Today, for example, the chemist is giving us literally thousands of so-called synthetic products—products produced more cheaply and produced in more dependable quantities than Nature can produce their counterparts, if indeed she can even produce these counterparts. When it becomes possible to extract nitrate from the air over Ohio more cheaply than Nature's nitrate can be transferred from Chile to Ohio, is it much more than a particular use of words to say that man is unable to change the location of Nature's resources and powers? Or, take another case. One of our prominent engineers, whose record gives you confidence in his findings, asserts that he has invented a machine for the drying of our vegetables and our forage crops which operates at a cost less than that involved in the drying of these products by the sun's rays, all things being considered. Suppose, for the sake of argument, that this is true. Then the place to raise hay is no longer a place where the sun shines; it is a region of abundant moisture and abundant crops. If such a dehydrating machine were to revolutionize agriculture—as the power-driven machine and chemistry have already revolutionized manufacture—must we face a redistribution of the population of the earth's surface? If we must, is it much more than a particular use of words to say that man is unable to change Nature's powers and resources? If the dreams of some of our scientists come true and man becomes able to control atomic energy so that he may release from a thimbleful of matter the energy that is today secured from a whole coal field, in one sense it will be true that Nature's powers and resources have remained unchanged. But the practical consequences will be those of a vast change in those powers and resources.

In other words, when we reflect upon the impending changes in our economic order, will our thinking be safe if we use our words in such a way as to depict a rigid, inflexible situation as far as Nature's powers and resources are concerned?

And what of man's biological characteristics? Do these really constitute a fixed datum? There are those who question the assertion. I do not refer merely to the eugenics movement, although there are still biologists who think of it as not merely a possible but even a probable means of profound alterations in biological man of the future. Nor do I stress the argument, which seems to appeal to some biologists, that great changes in man's physical, mental and moral characteristics can be brought about through chemical action of one sort or another. But what are we to say of the biologists who today question whether the germ plasm is really a thing substantially uncontrollable by man? What are we to say of those biologists who anticipate that the time may come when mutations may actually be produced? All that an economist can say is that such matters must be left to the biologist; but until biologists are in greater agreement than is the case today, the economist cannot safely assume that in the biological characteristics of man he has a fixed datum not only for the past but for all future time.

SUMMARY

One way of summing up the whole matter is to point out that this curious

being, man, has fairly recently made up his mind to act like a god. He has decided to be master of his fate with respect to the control of his physical environment, master of his fate with respect to the control of his social environment, and, most daring and dangerous of all, master of his fate with respect to control of his own physical and mental characteristics.

In a sense, there is nothing tremendously new in this. The most primitive man who picked up a stick and struck a rabbit was to that extent exercising control of his physical environment. And, of course, by the time of Neolithic man, some very considerable amount of control of the physical environment was being exercised. But the striking thing with respect to the current situation is the fact that the great mass of us are today thinking thoughts and dreaming dreams about the control of our physical environment which only a handful of "visionaries" dared to think but a few generations ago. Does this not sound like the achievement of a god? So also earlier peoples—the Greeks being notable examples—have thought in terms of control of the social environment; but only in our generation do we find masses of people hoping to apply in the institutional realm—in education, in government, in religion, in the family and in other elements of our social environment—the same kind of scientific knowledge and technique that has become a commonplace in the physical realm. Does this not sound like the aspirations of a god? And when we find otherwise sober scientists dreaming of altering the germ plasm, dreaming of making changes in the biological characteristics of lower animals and ultimately of man, does this not sound like the dreams of a god?

One of the prophets of our current order has felt that man is entitled to such aspirations and dreams. He says:

> Everything seems pointing to the belief that we are entering upon a progress that will go on, with an ever more confident stride, forever. We are in the beginning of the greatest change that humanity has ever undergone. There is no shock, no epoch-making incident—but then there is no shock at a cloudy daybreak. At no point can we say, "Here it commences, now; last minute was night and this is morning," but insensibly we are in the day.
>
> It is possible to believe that all the past is but the beginning, and that all that has been is but the twilight of the dawn. It is possible to believe that all that the human mind has ever accomplished is but the dream before the awakening. We cannot see, there is no need for us to see, what this world will be like when the day has fully come. We are creatures of the twilight. But out of our race and lineage minds will spring, that will reach back to us in our littleness to know us better than we know ourselves, and that will reach forward fearlessly to know this future that defeats our eyes. A day will come, one day in the unending succession of days, when beings shall stand upon this earth, as one stands upon a footstool, and shall laugh and reach out their hands amidst the stars.

All this is possible, but there is another possibility that we would do well to recognize. It is possible that mankind is to demonstrate the truth of the old adage, "Whom the gods would destroy, they first make mad." It is possible that the aspirations and dreams of this strange creature, who is now ascribing unto himself the qualities that in the earlier days of myth and superstition he ascribed unto godhood, are but the foreshadowings of a tremendous cataclysm. May it be that this strange being who but one hour ago was cowering in caves and hiding in trees; who only twenty minutes ago had domesticated animals, agriculture, weaving and pottery; who only forty seconds ago began to secure the substantial beginnings of mastery through scientific knowledge; and who for one short second has strutted his way like a god across the stage of life—may it be that he is but wearing a mask and that behind his godlike mask there is a grinning, drooling, dwarfish clown?

The Economic Philosophy of Anti-Trust Legislation

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TO some, no doubt, this title will suggest a contradiction in terms. How, it will be asked, can laws which throttle business enterprise, which arrest the economic development of the country, which subvert well established economic principles by interfering with the voluntary efforts of enlightened self-interest to adjust supply to demand, how can an economic philosophy be justly ascribed to such laws? Are they not rather an expression of the very negation of any "philosophy," of any love of wisdom whatsoever? The critics of the anti-trust laws who take this extreme attitude see in them only a sop of politicians to their constituents. They profess to believe that the laws regulating business have not been enacted in response to any valid grievance, but only in order to delude the general public into the supposition that something is wrong and that the professional vote-catchers have sagely provided an effective remedy. Such critics would not hesitate to offer a parody on our title, as "The Political Philosophy of Anti-Trust Legislation."

But there are others who will also challenge the title as self-contradictory, though from a different standpoint. How, they will ask, can laws which not only provide for no consciously coördinated control of the productive process, but which actually prohibit under penalty collective efforts to abate the most grievous wastes of competition and to establish system and order in place of planless confusion, how can the philosophy behind such laws be justly characterized as *economic?* That there is an economic philosophy of a sort expressed in the Sherman Act, these critics are generous enough to allow; but they do this only in order to provide themselves with a straw target for their shafts of ridicule. The economic philosophy of anti-trust legislation, according to them, is an eighteenth century philosophy evolved from handicraft industry and local markets. It is based upon an assumption of robust, up-standing individualism. It assumes, in other words, that all, or most, persons are equally endowed mentally and physically for carrying on the economic struggle, and equally resolute to succeed. It takes for granted, moreover, these critics contend, a freedom of opportunity such as prevailed only under frontier conditions when an abundance of natural resources awaited the exploitation of any energetic hand. Upon the straw target of this fancied philosophy of simple individualism the critics of this stamp are prepared to impale all who express either sympathy or tolerance for anti-trust legislation. Anticipating their objections to our title, it might be paraphrased as "The Uneconomic Philosophy of Anti-Trust Legislation."

I

Alternative Public Policies

Between those critics who can see no guiding principle in the attempt of government to regulate business and those who can see in it only the expressions of a misguided economic philosophy, there is a wide chasm. In essence, the former are reactionary; they condemn the law because it imposes too great restrictions. Contrariwise, the latter are revolutionary; they attack the law because it does not provide enough restriction. The former look to a restoration of the unchecked liberty of the private trader to cure the ills from which business is alleged to suffer under the anti-trust laws. The latter look to the governmental assumption of still further regulatory powers over private business as the solution of the problems of waste and maladjustment engendered by the laxity of the present purely negative policy of regulation.

It is obvious that these two classes of critics, though not in agreement upon the question of whether an economic philosophy underlies the anti-trust laws, are alike in this respect, at least, that each has an economic philosophy of its own. Both speak from a definite theoretical standpoint, and both hold their respective standpoints on account of certain assumptions, certain articles of faith, if you will. Perhaps the best way to determine the nature and soundness of the economic ideology implicit in the anti-trust laws, therefore, will be to examine somewhat critically the philosophies of its most severe critics. At least as a preliminary to the consideration of the main topic it will do no harm, in view of the atmosphere of heated controversy which has come to envelop it, to take a reconnaissance of the battlefield and get a fair estimate of how the attacking forces are deployed and what is their strength. An aggressive foray of this nature need not be interpreted as a definitive alignment with the forces defending the citadel, i.e., the Sherman Act. We should much prefer the rôle of innocent noncombatants caught between the opposing lines and determined to test for ourselves the basic factors upon which the ultimate victory (or stalemate?) will depend. But if, for the purpose and for the moment, undertaking this offensive sally *does* ally us, in so far, with the citadel-holders, the expedition may be interpreted as a direct challenge, nevertheless, to their evident strategy of passive defense. Almost inevitably citadel-holders seem to become obsessed with the idea that their position is impregnable, that all they have to do is to let attacking parties beat their malign heads and menacing fists upon the unyielding walls. But the rule of military strategy which declares an attack the best defense might find proper application, we suggest, in the debate over public economic policy now going on in the United States.

II

Forward via Backward

The economic philosophy of those who criticize the anti-trust laws for their excess of regulation is the philosophy of *laissez faire*. This is the system of economic thought which, as has been shown above, is mistakenly imputed to the sponsors of the public policy declared in the Sherman Act.[1] It springs from a theory of private (natural) rights, and it minimizes the inequalities of economic condition which result from free enterprise and unrestricted opportunity in trade. In so far as these disparities of fortune are recognized, they are attributed to wilful difference in ambition or to ineradicable differences in talent. But it is only fair to the critics of the economic policy of the anti-trust laws who, consciously or unconsciously, make the natural rights —*laissez faire*—theory their point of departure, to state that most of them today give a new version to an old theory. They are far less inclined than some of their nineteenth century predecessors to base their argument upon dogma. The "rights" of which

[1] *Cf. Trade Associations: Their Economic Significance and Legal Status.* National Industrial Conference Board, 1925, ch. XXII.

they speak are more in the nature of constitutional rights founded upon social utility than of imprescriptible rights founded upon a "natural" order. They emphasize less the beneficence of competition than the advantages of liberty. They put their trust not so much in the providential outcome of an industrial "trial by combat," as in the piercing foresight and prudent self-restraint of enlightened self-interest. *Laissez faire* is not for them a war of each against all. It is an economic policy which allows the widest freedom to the gifted few to organize and operate industrial enterprises for their own good. It assumes that they will minimize the wastes of conflict and guide the productive process in the right direction and at the proper pace, all in their own private interest. The affairs of the ungifted many are expected to prosper better under the genius of the few for managing things smoothly than they would under the haphazard arrangements of individual self-direction. This is the philosophy of the contemporary critics of anti-trust policy who would abate the governmental restrictions on business distinguished from the school of thought represented by Herbert Spencer and commonly identified by the term *laissez faire*.

The crucial test of the practical expediency of adopting this modern version of *laissez faire* and proceeding to revise existing anti-trust policy accordingly is in the assumed identity of a high profitableness in trade and of a high standard of living in the community. Is business prosperity synonymous with the common welfare? If the maximum of gain for the few invariably means the maximum satisfaction of wants for the many, then it is fatuous folly to maintain in force the restrictions of the anti-trust laws. Those regulations are avowedly designed and, judging from the squirming protest they evoke in some quarters, actually have an appreciable effect of curbing the overreaching greed and cupidity of a certain class of business men.

PROFESSIONAL RESPONSIBILITY

It is undoubtedly true that there is a growing sense of professional responsibility in the management of great businesses.[2] The more vast the resources and the more far-flung the interests of the huge organizations which have been formed in response to the technical and commercial advantages of large scale, integrated operations, the more imperative has become the practical necessity of conducting these enterprises as though they were public trusts. A quasi-fiduciary responsibility has been enforced upon the business executives charged with the management of such concerns in their relationships to consumers, creditors, customers, and even stockholders and employees. The very breadth of vision and range of judgment required in their day-to-day transactions foster a long-run point of view in the formulation of business policies. Such enterprises cannot be run upon the principles by which fly-by-night concerns flourish. A management which undertook to conduct the business of, for example, the General Electric Company or the National Biscuit Company in accordance with considerations of maximum immediate profit would be not only shortsighted, but short-lived. It is not surprising, therefore, that "honesty," and therewith fair dealing, has actually come to be recognized as "the best policy" in a large section of the business world.

Nevertheless, the ranks of business are not selected, like the angelic host,

[2] See *Mergers in Industry*. National Industrial Conference Board, 1929, particularly chs. VIII and IX.

by a vigilant gate-keeper. Anyone who aspires, and has the funds, may enter. The key to business independence is not the hereditament of any family or class. Every clerk has his secret pass key. Like the batons in the knapsacks of Napoleon's troopers are the savings accounts of the industrial army of employees. In these circumstances, it would be folly to expect the same self-restraint, moderation and circumspection in the entire corps of business enterprisers that is found among experienced executives with large responsibilities and proven capabilities. There is a steady increment of new recruits ever passing on, and alas off, the stage of business management. Many of them have no knowledge of manufacturing costs, no judgment trained in the interpretation of market conditions, no scruples or traditions to fortify them against sudden impulse or fear. They are the prey of shrewd bargainers and equally blind competitors. They have no compunction, therefore, against preying upon unwary customers whenever and however the opportunity offers. Nor do they hesitate to spoil a good market in search for some illusory profit or in revenge for some imaginary grievance.

SOME APPLICATIONS

It is for the protection of the public interest against the nefarious designs and the unfair practices of this element in the business world that the anti-trust laws are still maintained, and in our judgment properly maintained. If the anti-trust laws do not go further than they do, and actually afford a proportionate and, indeed, an adequate protection to private trade interests adversely affected by the operations of this class of business enterprisers, that is an argument which may be advanced by those in favor of *increasing* the restrictions of governmental regulation of business. It is not an argument of which those critics of the anti-trust laws, who would repeal them or emasculate them, can avail themselves. Rather, the fact that some protection, even though perhaps inadequate, is afforded to private trade interests against this ignorant, undisciplined competition is a circumstance of the general situation which these critics are too prone to overlook.

As an outstanding example of a positive accomplishment of the anti-trust laws in this direction may be mentioned the restrictions upon commercial bribery. The giving of secret gratuities or favors to the employees of a customer in order to stimulate trade is now recognized as an unfair method of competition, and the Federal Trade Commission has done much in the past fifteen years to enforce the abandonment of this demoralizing practice by unscrupulous competitors.[3] Yet the common law afforded absolutely no protection to the honest trader against this particular type of ruinous competition. The entire development has come under the Federal anti-trust laws. Still more significant of the increasing value of the anti-trust laws as a measure of protection to private trade interests is the regulation of price discrimination under Section 2 of the Clayton Act, which is being steadily expanded by judicial interpretation and trade practice conference rulings of the Federal Trade Commission. It is by no means beyond the range of practical possibility that surreptitious undercutting of prices may shortly be stopped by the application of legal penalties.[4] The advantages to legitimate business interests from the protection afforded

[3] See *Public Regulation of Competitive Practices*, 2nd edition. National Industrial Conference Board, 1929, ch. V.

[4] *Ibid.*, ch. IV.

by these two types of anti-trust regulation, not to mention protection from boycotts,[5] are not the least of the sound reasons for refusing to follow the critics who would remove the governmental restrictions on business.

ANTI-TRUST LAWS NECESSARY

The need for maintaining the prohibitions of the anti-trust laws might even be viewed as having increased rather than diminished, on account of the notable elevation of the standards of business practice among the outstanding representatives of big business in recent years. The very reputation for fair dealing and honest values which the leading producers in various lines of industry have established has lulled the general public into a false sense of security. Its buying habits are far less cautious today than they were a generation ago. In the measure that consumers become more trustful in brands and advertising claims, however, they become more susceptible to victimization by commercial sharpers and tricksters; and that they are in fact readily imposed upon, on a colossal scale, by clever advertising campaigns, is matter of common knowledge. If it were not, the records of the Federal Trade Commission showing what has been done in the last fifteen years under this branch of anti-trust legislation to forestall the more flagrant of these frauds and swindles should be convincing. The Commission has issued approximately two thousand formal complaints, and a very large part of its work in pursuance of its mandate to prevent unfair methods of competition consists in the efforts either to stamp out deceptive misrepresentation in all its hydra-headed forms or to thwart price-fixing projects of one type or another.[6] If these efforts appear to be as the labors of Sisyphus, that would seem to be no ground, nevertheless, for abandoning them altogether and losing not alone the limited protection of their actual corrective effect, but as well the protection afforded indirectly by their constant reminder to consumers to beware.

Not less convincing than the administrative record of the Federal Trade Commission is the record of prosecutions by the Department of Justice. The continuing need for the protection of the public interest by anti-trust legislation against the irresponsible and irrepressible minority in business is shown by the fact that there were eighty-four government suits instituted in the six years of the Coolidge Administration as against ninety in the eight years of the Wilson Administration.[7] That this indicates an increasing occasion for intervention in trade by the public authorities in defense of the general interest, rather than a tightening or stiffening of the enforcement policy, will not be questioned by anyone having the slightest familiarity with the Administration's attitude toward business in these two periods. Moreover, if one examines the entire record of anti-trust cases disposed of in the courts, both private suits and Government actions, during the eight years of the Wilson régime and during the past eight years, the result strengthens the same conclusion. From 1913 to 1921 there were 127 separate proceedings based upon the anti-trust laws adjudicated in the Federal courts, counting each case only once no matter how many times it may have been reported in the same or different courts. Upon the same basis, from 1921 to 1929, there were 136 separate proceedings determined in the courts, from which no appeals are pending.[8] Thus, in the Harding-Coolidge régime it is evident that, despite the absence of any militant or blustering gesture for political effect, in the ordinary course of executive routine, or of defense of private interests adversely affected, the occasions for challenging the social legitimacy of business arrangements or policies continued to increase. In this record, it is submitted, no solid ground can be found for the contention that we have passed beyond the need for legal restrictions upon the forms and methods of business enterprise.

[5] See, e.g., upon commercial boycotts, *Binderup* v. *Pathé Exchange*, 263 U. S. 291 (1923), and *Ramsay Co.* v. *Associated Bill Posters*, 260 U. S. 501 (1923); upon labor boycotts, *Duplex Co.* v. *Deering*, 254 U. S. 443 (1921), and *Bedford Stone Co.* v. *Journeymen Stonecutters*, 274 U. S. 37 (1927).

[6] See *Public Regulation of Competitive Practices*, 2nd edition. National Industrial Conference Board, 1929, App. I.

[7] See address by Colonel William J. Donovan before the Pennsylvania Bar Association, Bedford Springs, Pa., June 28, 1929, pp. 15–16.

III

LEAPING FORWARD IN THE DARK

The economic philosophy of the other school of criticism attacking the present anti-trust policy in nowise resembles this modern version of *laissez faire*. It proceeds from a radically different starting point, and it is directed toward an entirely different goal. Those who contend that the anti-trust laws neither impose nor permit sufficient restriction upon private discretion in business management to foster, properly, the public welfare are convinced that "enlightened self-interest" is an illusion. It is, for them, a mere phantom of theorists' imagination. Consciously or unconsciously, mostly unconsciously, they take for their point of departure the assumption, exactly opposite to the other school of critics, that individuals as economic prime movers are in general blind and benighted. In terms made familiar by centuries of theological controversy, they accept the doctrine of "original sin." And as in theology the acceptance of this doctrine inspires, one might almost say constrains, to a staunch faith in messianic redemption, so in political economy, in the good old sense of the term, the acceptance of a parallel doctrine induces a fixed persuasion that somehow everything can, and will, be set right by the master plan of some preternatural genius. The competitive pursuit of private advantage in a community of individuals in which each is left free to make his own choices and follow his own courses can lead only to defeat and mutual frustration, these critics are convinced. Yet this same community will find spiritual fulfilment and material plenty, we are asked to believe, under the guiding hand of some benevolent dictatorship.

ECONOMIC DICTATORSHIP

All that is lacking for economic salvation is organization. Everything must be put in its place. Everything

[8] This compilation was made from the collection of *Federal Anti-Trust Decisions*, published by the Department of Justice, Washington, 1918, 1924 and 1925, vols. 4, 5, 6, 8, 9 and 10. It includes some cases not based upon the Federal anti-trust laws in the strict sense, particularly a limited selection of cases instituted by the Federal Trade Commission under Section 5 of its organic act. Most of these, however, are of a nature which would have permitted action under the anti-trust laws, properly speaking. The omissions from the collection which are most important are the proceedings settled by consent decrees. For the years 1927 and 1928 the compilation is based chiefly upon the American Digest annuals.

In those instances, comparatively few, in which final judgments had been entered in the earlier period but the case reopened in the later period, as for example to contest or enforce the defendant's compliance with the decree, the case has been treated as settled in the earlier period. Similarly, cases like *Loewe* v. *Lawlor*, which were still in the courts in 1913, but were really "hang-overs" from the years preceding, have not been listed among the cases settled from 1913 to 1921.

must be done according to a rationally predetermined plan.[9] Only a general conversion from the gospel of "each for himself" to the gospel of "thy will be done" is necessary to raise us from the competitive hell to the concert of heaven. That only! These critics are not greatly concerned or very specific as to how this economic dictatorship, which is implicit in their every statement and which is indeed inescapable, starting from the premise of blind and benighted human nature, is to be organized. Certainly there is no agreement among them upon whether there is to be one dictatorship for each industry or one for all industries, whether it is to be lodged in a single autocrat or in a representative syndicate, whether it is to be established from within each economic sphere or imposed from without.[10] Illogically enough, some even deny that economic dictatorship is indispensable to economic rationalization. But they have not shown how "plan" can be substituted for "planlessness" in industry without some check upon the voluntary choices and commitments which might otherwise disturb the "plan."[11]

[9] As fairly representative of the thought of the school of criticism which is here being analyzed, we quote from an editorial, "Revising the Anti-Trust Laws," *The New Republic*, April 11, 1928, pp. 234–35:

"The trouble with competition is, centrally, that it involves the lack of intelligent planning. Its waste and confusion arise because nobody has thought through the job of the industry from beginning to end, and has had the facilities for putting into effect any large scale policy. . . . If we are to progress from the welter and waste of competition toward a better integrated economic order, we must do so with our eyes open and with positive purposes in mind. . . . There is no real substitute for planlessness except plan. Creative social control, built up soundly step by step, is the only desirable remedy for the ills of competition."

Of course, this is a one-sided view and proportionately unrealistic. Consider, for instance, whether it would not be as true to state, instead of what is said in the first sentence, that: "The value of competition rests, at bottom, upon the fact that it places a premium upon intelligent planning." And does the assertion of planlessness in modern industry, in view of the concrete accomplishments in recent years of trade coöperation through associations and institutes and the substantial progress in the art of management and the technique of forecasting, amount to anything more than the assertion that the one making the statement, given the opportunity, would not plan things as they are now planned?

[10] Contrast, for example, the studied insistence of organs like *The New Republic* upon the necessity for "social control," with the ill-digested ideas and cavalier projects of certain other writers. See, in particular, *Making Everybody Rich*, by Benjamin A. Javits (New York, 1929), e.g., chs. 3, 8 and 9; and *World Corporation*, by King C. Gillette (Boston, 1910), *passim*. The former would solve all economic problems by establishing an Institute of Industrial Coördination; the latter urges upon us the quixotic enterprise of joining all industries in a World Corporation—chartered in Arizona!

[11] This is admitted by the more circumspect critics of this general standpoint. See, e.g., an editorial reviewing *A Way of Order for Bituminous Coal*, by Walton H. Hamilton and Helen R. Wright (New York, 1928) in *The New Republic* for July 18, 1928, pp. 212–13.

[12] The Report of the Committee on Recent Economic Changes, of the President's Conference on Unemployment (New York, 1929) emphasizes that the burden of these losses from continual and cumulative change has been considerable even during a period of such general economic expansion and prosperity as that surveyed, mainly 1922–1928. See ch. I, on Consumption, ch. II, on Industry, and the final review, especially pp. 873–89.

CHANGE IN THE ECONOMIC PROCESS

That in every line of trade there is, under conditions of free competition, even regulated competition, frequent maladjustment of supply and demand, none will dispute. That such maladjustments inflict losses of profits and wages, in the aggregate amounting to substantial sums, cannot be denied.[12] They press most heavily, of course, upon the least efficient and the least foresighted. But are these losses properly to be regarded as unmitigated waste? Are they uncompensated by any offsetting advantages? The critics of the existing system of regulated competition would lead us to suppose that they are wholly uneconomic and indefensible. Let us see if analysis bears out this contention. Whence come these recurring periods of stagnation and disorganization in various markets? Let it be borne in mind that we are not here propounding any facile explanation of business cycles. The phenomena of contagious or epidemic movements from prosperity to depression and vice versa among the several lines of trade generally are not, as such, our present concern. We speak only in reference to the patent fact that every now and then every line of trade, whether or not simultaneously with others and usually not, gets into a slough, finds business unprofitable, retrenches production and is forced to take stock of itself. What is the source of this sort of difficulty? Speaking broadly, we submit that the source lies in *change*. If change did not occur, in the main ruinous competition and business disaster would disappear.

Can change, in the economic sphere, be stopped? The question might perhaps better be put, should it be stopped? Before answering, let us consider of what this change consists. What are the manifestations of change in the economic process which force these spasms of readjustment and their attendant losses? In a summary way they may all be classified under one or the other of two categories: changes in consumption standards or taste, and changes in productive methods, including distributive processes. In other words, there are just two basic types of forces which can, and actually do, disturb market adjustments. They are those producing changes in the conditions of demand and those producing changes in the conditions of supply.

PROPOSAL TO CONTROL CHANGE

Is there any sound reason for interfering with forces of either of these types, in the interests of industrial stability? That is the fundamental question which is raised by the critics of existing anti-trust policy who insist it does not, at least to a sufficient extent, regulate and thereby rationalize industry. Let no one be misled that the public policy these critics advocate will not interfere with the forces of change.[13] That is, in truth, its fundamental purpose and paramount significance. Its sponsors propose to *control* economic change in the interest of industrial *stability*. What does this involve? On the side of demand, it involves at the minimum some restriction upon the range of consumers' choice. Demand cannot be permitted the same wide range, with consequent volatility, that it enjoys today. There must be standardization, and still further standardization. Otherwise, long-range "planning" of production and the nice adjustment of supply to demand are simply impracticable.

Let us take a simple illustration. Assuming there are 140,000,000 persons, at home and abroad, to be supplied with footwear from American shoe factories, and assuming the average requirements per person, at a price per pair adequate to cover manufacturing and distributing costs, to be three pairs of shoes per year, a total annual output of 420,000,000 pairs is called for. By

[13] The reports of the Federal Oil Conservation Board, appointed by President Coolidge on December 19, 1924, evince a clear appreciation of the indispensability of coercive restrictions if "planned production" is to be established. For instance, in Report III, issued February 25, 1929, it is stated, p. 3: "The possibility of unrestrained individual action in what should await regulated community action still remains a menace to the present stabilized rate of production."

planning production on a steady schedule of approximately 1,400,000 pairs per working day these requirements could be filled. The assortment of this output among various sizes and between men's, women's and children's make-up could be fairly definitely calculated upon the basis of past experience. Operating upon this planned schedule, the shoe industry could undoubtedly dispense with a substantial part of the plants, machinery and labor force which are now provided, but not fully utilized. For the erratic fluctuations of the production curve in an industry functioning under competitive conditions, even one manufacturing such a staple product as shoes, necessitates the maintenance of equipment and personnel well in excess of average requirements.[14] It does so because each producer is constrained to estimate not only the gross demand, but also the share of that total which he can capture for his own market.[15] If the former estimate may be made a fairly accurate forecast, the latter can seldom be more than a gambler's guess. It depends upon too many variables, among which the most important is the nature and effectiveness of competitors' sales policies, to make prediction dependable. In these circumstances the substitution of a planned production schedule for the industry in place of the existing speculative management of production would unquestionably release for other uses a large amount of capital and labor now represented by so-called "excess capacity." And this situation in shoe manufacture is general, not exceptional, in manufacturing industries.

Why cannot, or at least why should not, comprehensive production planning for each industry be introduced, then, as the critics of the existing anti-trust policy contend? The answer is that it could be, advantageously, if consumers were willing, or could be constrained, to forego their prerogative of wilful and capricious shifting of demand. It is preëminently the influence of style, or fashion, upon consumer demand which makes it impossible for competitive producers to gauge their markets sufficiently far in advance to smooth out their production curves. Change is their nemesis. For shoe manufacturers it is a continual struggle to find a new color, or last, or leather, or a new combination of style factors that will be "popular," and when found it never lasts. Other manufacturers, makers of everything from baby bottles to coffins, have the same problem.[16] Even food products have their fashions nowadays. The tastes of consumers are veritably as fickle as are women's favors, proverbially. And such goods as are not subject to fickle demand on this account are constantly threatened by the inroads upon their markets of substitute materials, machinery or commodities. To imagine that, in these circumstances, any syndicated control of production could accomplish much of a saving *without interfering*

[14] Thus, in 1927, a fairly normal year, the average daily output in the month of maximum output was 1,300,000, and in the month of minimum output was 904,000 pairs. Presumably even the 1,300,000 daily output in August, 1927, was well below the maximum available capacity, so that it is safe to say that the idle men and machinery in the shoe industry in the least active month of this normal year could hardly have been less than thirty-five percent of the whole number available. See *Commerce Yearbook, 1928*. U. S. Department of Commerce, vol. I, p. 546, table 16.

[15] Consequently, there are many underguesses, followed by feverish speeding up of production while the unexpected demand lasts; and alas! fully as many overguesses resulting in sudden shut-downs or curtailments.

[16] The Committee on Recent Economic Changes in its Report, *op. cit.*, refers to this factor as "optional purchasing" or "optional consumption." See p. xv.

with the capriciousness of demand is simply preposterous.

"PLANNED" PRODUCTION

We do not say, be it marked, that the existing freedom of consumers' choice might not, on economic grounds, well be confined or restrained. It might appear, indeed, somewhat in the nature of a license to sabotage industrial production. What we do say, however, is that unless and until the community as a body of consumers is ready to forego the privilege, not only of buying according to whim or fancy, but also of having its passion for new things and for novel frills on old things indulged by the managers of industry, there can be no genuine gain from "planned" production. The assumption of the readiness of the community to submit to an arbitrary curtailment of consumers' choice, in the interest of productive efficiency, is in our view the most ill-founded and unreal assumption upon which the case of these critics of the anti-trust laws depends. Yet these critics are fond of priding themselves on being realists! The fact is that they have not yet learned what the veriest tyro in trade knows, that the mass of people prefer their foibles to their comfort. They do not understand that the great problem of economics is not how human *needs* may be satisfied, but how human *wants* may be satisfied. They talk glibly of eliminating waste in the manufacture of shoes, for example, by scheduling the output of 420,000,000 pairs a year without realizing that the real and inescapable business problem is not how to adjust the output of "shoes" in the aggregate to the demand, but how to adjust the output of light, tan, low, leather-heeled, narrow-toed, fancy-stitched shoes to *their* demand. And that is only a sample of hundreds of different forms of the same problem that must be faced and speculatively "solved" and "resolved" day by day.

These qualitative judgments, which are the very essence of the practical problem of business management in every sphere, simply do not exist for the critics who would extend still further the social regulation of industry. For them, the difficulties are all on a quantitative plane. With naïve conceit they insist that the standards of consumption that are good for them are good for others.[17] Consciously or unconsciously, these critics range themselves on the side of bigotry. They do not trust the educational process of individual self-determination. Freedom and spontaneity in economic affairs are for them only a hindrance to the realization of their own pet notions of our communal destiny.

This analysis of what is involved, on the side of demand, in the proposal to establish a concerted control of economic change will indicate the lines along which a similar inquiry might well be made in reference to the effect on the processes of supply. Spatial limitations do not permit such an analysis, in detail, here. It must suffice to observe that a policy of coercive regulation of, and collective responsibility for, industry involves at the minimum some restriction on experimentation in productive and distributive methods. When all the productive units in each industry are brought up to the same level of efficiency by the standardization of facilities and processes, even though that level be the best according to existing practice, what room is left for comparison and experimentation? And do not these

[17] It may be noted incidentally that the uncritical acceptance of this philosophy in a time of national peril led us into the Prohibition tangle. The unfortunate results, daily more evident, of this "experiment" might well induce some hesitation before undertaking a more comprehensive application of the same philosophy.

things constitute not only the most powerful impulse to technological invention, but as well the very essence of the inventive process? Will not the control of the forces on the side of supply, which now make for a spasmodic and irregular expansion of productive facilities with attendant losses from wholesale scrapping of obsolescent but not outworn equipment, retard technological improvement in the long run? Such are some of the questions to which the proponents of a radical extension of governmental regulation of industry must address themselves before we shall be convinced that the existing regulatory policy is inadequate.

IV

"Oh, Progress, art thou not enough!
Why should we cry for heaven above?"[18]

The foregoing reconnaissance of the "battlefield" of the current debate on public economic policy reveals that, whatever the economic philosophy embodied in the existing anti-trust laws may be, the philosophies of the two principal groups of critics are well marked and definitely incompatible. It is unfortunate for the attacking critics that they cannot merge their forces. But that is impossible, for the only point of agreement between them is that the present anti-trust policy is wrong. In these circumstances, the first observation that might well be made in defense of the general principle of Government regulation as represented by the Sherman Act and the Federal Trade Commission Act and amendments is that both groups of critics cannot possibly be right. There must be fundamental weakness on one side or the other. But is there no stronger position for the defenders of the present policy than this? May it not be that both lines of criticism are ill-founded? May it not be that the only sound economic philosophy, "sound" that is to say for the United States today and tomorrow, not necessarily forever, is the philosophy expressed in existing legislation?

We venture to suggest that every philosophy of human relationships, and, after all, the anti-trust laws embody nothing less than that,[19] is founded upon some postulate of human nature. It has its starting point in a conception of the capacities of individual men. The advocates of a return to *laissez faire* are convinced, as we have seen, of the universality of enlightened self-interest and of the indefinite perfectibility of human kind. The advocates of increased governmental control of business enterprise are equally convinced, on the other hand, of the inherent fallibility and reckless improvidence of men, left to themselves. They require, child-like, the stern discipline and guidance of paternal authority. Must philosophizing always lead to extremes? Is the "truth" only to be found in absolutes? May not, after all, a sound economic philosophy be predicated on a candid, realistic acceptance of the obvious fact that men are neither children nor sages, neither savages nor philanthropists, neither knaves nor saints? Is there, indeed, any other sensible and rational view to take than that some men are short-sighted and others farsighted, some predatory and others generous, some foolish and others wise? Or, more properly, is it not true that men act sometimes, or in some circumstances, upon prudent impulse and shrewd judgment and at other times are prompted by base instincts and narrow prejudices?

[18] With apologies to the poet, Sara Teasdale.

[19] As Colonel William J. Donovan, in charge of Anti-Trust cases while Assistant to the Attorney General of the United States, observed on one occasion.

In these circumstances, is not the clearly indicated path for the development of sound public policy toward trade the protection and fostering of honest enterprise, prudent investment and proficient management, and equally the prohibition and discouragement of every opposite course of business conduct? And is not this, in effect, the policy of the anti-trust laws? In ultimate principle, all that they ask is sober industry and fair dealing; all that they condemn is scheming to "get something for nothing." The positive arm of this policy is no less essential to its effectiveness than the negative. They are the complementary aspects of a single, consistent social policy. This is a feature of the existing anti-trust policy which its critics are too prone to neglect. Owing to the dual nature of our governmental system, the fact may easily be overlooked that the positive arm of public economic policy actually exists. It is, in the main, as yet, only implicit in Federal law.[20] It is explicit, chiefly, in state legislation and constitutional provisions. But in its proper province, the authority of the Federal Government is supreme. It is not confined to negative restrictions upon the trade and industry that are interstate or national in character.[21] And it may well be that for the more effective protection of property and encouragement of enterprise, Congress will in the not remote future find it expedient to exert, in a more positive fashion, its constitutional power to regulate commerce, e.g., by authorizing Federal incorporation. But whether or not this course is eventually followed, there are two facts which must not be lost sight of in the current debate. The first is that, irrespective of such an eventuality, there is today, by the implicit sanction of Federal law, a positive arm of anti-trust policy. The second fact, and this follows from the first, is that, should such an eventuality come, it would not necessarily mean a departure from the present public policy toward trade and industry. It would amount, if confined to such positive legislation as mentioned above, to no more than an extension, a logical development, of current anti-trust policy.

[20] So far as business in general is concerned. Not so in respect to interstate carriers, regarding whom positive regulation has been extensively undertaken. See, for examples, the cases cited in the next footnote below.

[21] See *Luxton* v. *North River Bridge Co.*, 153 U. S. 525 (1894); *Johnson* v. *So. Pac. Ry. Co.*, 196 U. S. 1 (1904); *Employers' Liability Cases*, 207 U. S. 463 (1908); *I. C. C.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452 (1910); *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186 (1911); *Wilson* v. *New*, 243 U. S. 332 (1917); *U. S.* v. *Ferger*, 250 U. S. 199 (1919); *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456 (1924).

CONSTRUCTIVE CHARACTER

If the foregoing is a fair presentation of the fundamental economic philosophy of anti-trust legislation, it need not, clearly, be taken as a defense of every section and every clause in the statutes. It has been elsewhere pointed out that there has been a considerable development of amendatory legislation in recent years, much of which has been ill-considered, opportunistic and carelessly drafted.[22] The provisions of some of these laws are inconsistent with others, in some instances exemptions have been granted which appear injudicious, and in some respects the fundamental policy of the law has been modified apparently unwittingly and unfortunately. This whole body of law should be reconsidered, section by section, in the light of principle and experience, and codified. It might well be found to require extension in some directions, and pruning in others. Such an undertaking would

[22] See *Mergers and The Law.* National Industrial Conference Board, 1929, ch. V.

contribute greatly to a better understanding of the fundamental principles of public economic policy and a clearer definition of the scope and requirements of the law.

Let it be added in conclusion, however, that it assists not at all in the accomplishment of this task, or even indeed in the attainment of their own wider objective, for critics of the anti-trust laws perversely to misrepresent the present situation. To assert, as some of these critics have asserted,[23] that the Sherman Act enforces an absolutely unrestricted and unregulated competition, is to ignore the great achievements of the courts in the past two decades in molding this flexible statute to the practical requirements of modern industry and commerce. To cite only recent cases dealing with relations among trade competitors, there are at least six outstanding cases in the past twelve years which definitely and conclusively disprove such an assertion.[24] Again, when it is declared as it has been,[25] that the provisions of the Sherman Act are not only formally, but essentially, negative and destructive in character, since they absolutely forbid price agreements among competitors, a long line of cases in which business men have successfully defended their legitimate interests against unjustifiable boycotts is completely disregarded. To mention only recent cases of this type, there have been not less than seven outstanding cases in the past twelve years demonstrating beyond cavil the "constructive" character of this law from any conceivable standpoint of decent business management.[26] Such juggling with the facts of record as here instanced is inexcusable.

It may be tolerated under a firm faith in "free trade in ideas,"[27] to borrow a phrase from the eminent senior Justice of the Supreme Court of the United States; but those who have a parallel faith in "free trade in the market" need have no misgivings that rival economic philosophies will win their way to popular favor by such "unfair methods of competition."

[23] See, for example, "Amendments to United States Anti-Trust Laws," an address by Felix Levy before the Committee on Commerce of the American Bar Association, New York City, March 23, 1927. It is stated, p. 4, that: "The real trouble is that our anti-trust laws . . . have been extended into the domain of private business so as to prevent any and every form of coöperation among merchants. Thus, the real trouble is that our anti-trust laws force the business men of this country into ruthless and cut-throat competition with each other by forbidding them to enter into any coöperative agreements, even when such agreements are economically necessary to prevent the demoralization if not the ruin of the industry thus sought to be safeguarded."

If we may be permitted to paraphrase this statement, we should say that the real trouble with such criticism is that it has been extended into the domain of fiction. The cases cited in footnote 24 are proof of its falsity.

[24] *Chicago Board of Trade* v. *U. S.*, 246 U. S. 241 (1918); *National Assn. of Window Glass M'frs.* v. *U. S.*, 263 U. S. 403 (1923); *U. S.* v. *New York Coffee Exchange*, 263 U. S. 611 (1924); *Maple Flooring Manufacturers Assn.* v. *U. S.*, 268 U. S. 563 (1925); *Cement Manufacturers' Protective Assn.* v. *U. S.*, 268 U. S. 588 (1925); *Moore* v. *New York Cotton Exchange*, 270 U. S. 593 (1926). The decisions in *U. S.* v. *American Linseed Co.*, 262 U. S. 371 (1923); *U. S.* v. *Live Poultry Dealers' Assn.*, 4 Fed. (2nd) 840 (1928), and *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927) are not inconsistent with these rulings.

[25] See, for example, "The Self Regulation of Industry," an address by Rush C. Butler broadcast by the National Broadcasting Company, April 16, 1929. It was stated, p. 4 of the reprint, that "As now interpreted, the *only* final, definite and conclusive provision of the Sherman Law is negative and destructive in character, . . . namely, that competitors may not agree upon prices even though the prices agreed upon are reasonable." [Italics not in original.]

The answer to this statement is that it is not true. If there is one point more conclusively settled than any other under the Sherman Act, it is that a boycott or other unjustifiable obstruction to the trade of a business enterprise is illegal. Cf. cases cited in footnote 26.

[26] *Thomsen* v. *Cayser*, 243 U. S. 66 (1917); *U. S.* v. *New England Fish Exchange*, 258 Fed. 732 (1919); *Duplex Co.* v. *Deering*, 254 U. S. 443 (1921); *Ramsey* v. *Associated Bill Posters*, 260 U. S. 501 (1923); *Binderup* v. *Pathé Exchange, Inc.*, 263 U. S. 291 (1923); *Brims* v. *U. S.*, 272 U. S. 549 (1926); *Bedford Cut Stone Co.*, v. *Journeymen Stonecutters' Assn.* 274 U. S. 37 (1927).

[27] From the dissenting opinion by Justice Holmes in *Abrams* v. *U. S.*, 250 U. S. 616, 630, (1919).

The True and Limited Function of Anti-Trust Statutes

By Jesse W. Barrett

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THERE are many who assert that our present anti-trust statutes are weak and inadequate, while others are praising their wisdom and strength, and still others are regarding them with confusion and uncertainty. The writer submits that before intelligent discussion can be had there must first be a clear and general understanding of the nature and purpose of these laws. They are not affirmative, but negative. They do not compel; they forbid. They do not create competition; they forbid artificial interference with full and free competition. The statutory law cedes to the economic law its authority in the field of competition. It places the economic law upon the throne, so to speak, and is content to stand by with drawn sword to defend it. With that conception in mind, much of the confusion respecting the use and abuse of the anti-trust statutes is removed, and it is possible to discern both their weaknesses and their strength.

Competition and Prices

The weakness in this governmental policy is that it presupposes the existence of competition, or at least assumes that healthy competition must arise, in the absence of any artificial barrier or restraint. This, in turn, presupposes a competitive field of equals or near equals, and the theory fails where that is not true.

For illustration, while I was Attorney General of my state, I found that all of the brick companies in St. Louis were using the same price list, and that prices appeared to be too high. Except for the latter circumstance, I might not have thought investigation necessary, for uniformity of price does not, as the public commonly believes, constitute proof of price combination, nor is it necessarily objectionable. The American farmers, for instance, have no price agreement, yet the price of wheat on a given day and at a given place is invariably the same for all sellers. The uniformity is due not to restraint of competition, but to the fullest and freest competition. As John Stuart Mill said in his *Principles of Political Economy:*

> It is axiomatic that there cannot be for the same article of the same quality two prices in the same market, assuming that both the buyer and the seller take pains to know what that price may be.

Free competition is the great evener. It is just as inconceivable that you can have two levels of water in a set of communicating tubes as it is that you can have two levels of prices in communicating markets. The freer the flow of water between the tubes, the sooner the same level will be reached in all the tubes.

Large Companies as Stabilizers

This free action of competition, however, levels the price around the *justum pretium*, and abnormal price suggests artificial influences.

In this instance I found with certainty that no illegal price agreement existed; in fact, I found that nothing could be more useless. One brick company was as large as all of the other companies combined. The total output of all of the companies was not

larger than the local demand, and heavy freight charges made it impracticable to import brick from other cities. The large company made its prices without consulting or agreeing with anyone else. The small companies made no effort toward lower prices for the simple reason that if they did so the large company would lower its price also, thereby meeting them again on equal terms, but on a basis which would hurt the smaller companies more than the large one. The larger company, in turn, knowing that the smaller ones would follow its lead as to prices, had no reason arising from competition for holding its prices down. All of the small companies frankly admitted that they followed the price list of the large company to the very letter. Price competition was dead, but there was no evidence whatever that the lack of competing prices resulted from any violation of the law. The situation arose as naturally as it would in a kennel occupied by one large dog and numerous smaller ones, the smaller ones not daring to attack the larger and the larger paying no attention to them as long as they let him alone.

The same condition exists generally over the United States with respect to other lines, as, for instance, the gasoline trade. In nearly every state there is one company so out of size with its competitors that it is able to dominate the price. Small oil dealers have admitted to me that they telephoned each morning to the office of the leading company to inquire its prices for that day, which they immediately adopted as their own. They said if they happened to be higher in price, they would lose their trade, since the larger company's prices were generally and widely known, but that if they attempted to gain more business by selling at a lower price the established policy of the large company of instantly meeting all price reductions would again bring them to an equal price, but on a lower basis and with less profit. None of the small dealers expressed dissatisfaction or complaint in the matter; on the contrary, they praised the large company as "the great stabilizer," saying that if its influence were removed the entire trade would be plunged into a cut-throat competition which would bankrupt most of them.

Mergers

The mergers of the day are multiplying innumerably instances of this sort. Gigantic combinations are arising in all of the important lines of trade. It was perhaps with this in mind that Governor Franklin Roosevelt, in his address at Tammany's Fourth of July celebration, asked:

> Are we in danger of the creation in these United States of such a highly centralized industrial control that we may have to bring forth a new Declaration of Independence?

With all due allowance for his forensic emphasis, it must be admitted that a very real problem has arisen.

Further, organized power carries its own momentum, and it is human experience that power possessed is sooner or later power exercised. What men can, they will. The influence of these combinations is not even limited to their own field. It is conceivable, for instance, that a general merchandising chain could be persuaded to abandon its line of groceries by the threat of a grocery chain that otherwise it would extend its operations to general merchandising. In such an instance both fields of trade would be adversely affected. The same could be true with respect to allocations of territory.

It would not be difficult to draft a law which would destroy all large

combinations. The real seriousness of the problem arises from the fact that these tendencies toward merger are also productive of so much good. The elimination of waste and duplication means tremendous savings which ought to benefit the consumer and, as a matter of fact, have strikingly done so in many instances. The cost of many luxuries is no longer prohibitive, but by mass production has been brought within the reach of millions. American business has become the most intelligent and efficient in the entire world. The tree may need spraying or pruning, but it must not be cut down.

PROPOSED GOVERNMENTAL CONTROL

In a recent radio address, Samuel Untermeyer of New York urged the repeal of the Sherman Anti-Trust Law, and suggested as a substitute the placing of broader powers of control in the Federal Trade Commission. Referring to the mergers of the day, he said that Prohibition enforcement would be child's play as compared to the enforcement of the Sherman Act: that

> these combinations have reached a stage where we could no longer, if we would, retrace our steps and put new life into these laws. Effective legislation and a courageous and impartial enforcement of the law against the thousands of offenders involving the most powerful men in the industrial and financial life of the nation, and affecting millions of investors and thousands of millions of dollars, would plunge us into a veritable debacle that would shake the very foundations of our prosperity.

He insisted that commission regulation was the only feasible alternative.

If Mr. Untermeyer is correct, then governmental regulation must proceed to bounds hitherto undreamed of and unknown. Those who contend for extension in governmental regulation will, in the writer's judgment, have difficulty in establishing their major premise as to the success of the present regulation by commissions. In fact, the *St. Louis Post-Dispatch* on September 1, 1929, published what purported to be a signed statement from Mr. Untermeyer commenting on a proposed street car franchise, in which he said:

> Experience has, I think, demonstrated that public regulation through state commissions is in most states unsatisfactory, to the point of being a failure. Even where there is well intentioned regulation, it is cumbersome and inefficient . . . the difficulty of maintaining the character of service required through commission orders and judicial proceedings makes for steady evasion and deterioration in service. You cannot successfully conduct a business enterprise through a succession of judicial orders and decrees.

President Coolidge recently said:

> It is too much to assume that because an abuse exists it is the business of the National Government to provide a remedy. The presumption should be that it is the business of the local and state governments.

We believe that Mr. Coolidge would be willing to amend and extend his statement to say that there must first of all be a presumption that a remedy can be found by private initiative or coöperative action rather than by placing new burdens on government, whether Federal or state. We believe that the better judgment of the day is against the constantly increasing tendency to multiply governmental commissions and to place everything under governmental control.

We submit that there are many conditions of life which are actually outside of the reach of government, and properly so. The fixed phenomena of the natural law are as wholly outside of legislative control as are the seasons and the weather. It is only in exceptional cases that the statutory and natural laws can combine happily and effectively.

We submit, further, that in many instances where the statutory method is used to obtain a given and desired result, a score of other consequences ensue which were neither expected nor desired. The writer confesses to personal experiences of this sort. As a state officer, I instituted and presented to the United States Supreme Court what is known as the National Branch Bank case, by which I put an end to branch banking in Missouri and established the rights of the other states to do likewise. In place of branch banking we now have group banking, which I humbly admit seems to retain the disadvantages of branch banking without many of its distinct advantages and benefits. Who cannot cite many other examples of similar purport?

Further, if centralization of business is inherently objectionable because of the concentration of power, then how much more menacing is the constantly increasing centralization of government at Washington in its mighty march to federal empire.

We need to read again de Tocqueville's *Democracy in America*, particularly the passage about the

> immense and tutelary power which takes upon itself alone to secure the people's gratifications and to watch over their fate. Instead of preparing men for manhood it seeks to keep them in perpetual childhood. It extends its arm over the whole community; it covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate to rise above the crowd. . . . It compresses, enervates, extinguishes and stupifies a people until each nation is reduced to be nothing better than a flock of industrious and timid animals of which the Government is the shepherd.

AMERICAN EXPERIENCE IN GOVERNMENTAL CONTROL

May we return to our original proposition that much of the confusion regarding our anti-trust statutes has resulted from a failure to understand their basic policy and plan, and that what appears to be their weakness is likewise their strength. They declare a fundamental policy of this free Government which is born of ripened experience, tested by time, and which must not be amended or abandoned without the gravest reflection and care. The American colonies, following the earlier experiments on the continent, had tried to regulate by law the price of wages, bread, merchandise, ale, mill tolls and even attorneys' fees. The harmful results are well known. Adam Smith brought to public recognition and acceptance the right of the individual to an unimpeded sphere for the exercise of his economic activity, and the soundness of his reasoning reshaped our public policy. Competition, then, instead of legislation became recognized as the great price regulator. Step by step the public policy of the United States has developed the principle that government should keep hands off of business as far as possible, and has left the control of business to natural laws wherever natural laws would within themselves work a cure. Our anti-trust statutes have not been regulatory, but merely protective. They emphasize the inexorable economic law of supply and demand, and dedicate their strength to its safeguarding. The anti-trust laws may be called the insulation for the wires which carry the currents of trade. That insulation is both important and necessary in its function of conserving those trade currents and immunizing them from outside interference, but the insulation is pur-

poseless except in conjunction with the object to which it is applied.

Rather than to abandon or amend one of the cardinal principles by which America has grown to its greatness, would it not be far better first to inquire whether our chief need now may be a further extension and a fuller application of that principle?

ECONOMICS AND LAW

Perhaps at times we have been at fault in the construction and the application of our anti-trust statutes. It is only in recent years that our courts have recognized the economic issues as paramount in these cases. A few years ago I endeavored to persuade the Supreme Court of my state that in a certain anti-trust proceeding the real issue was one of economics rather than of law, and I offered the expert testimony of such noted economists as Dr. Francis Walker, Dr. Lewis H. Haney and Myron B. Watkins to prove that a restraint of competition necessarily resulted from the compulsory use of a central bureau for the computation of quantities and costs. The Court excluded the testimony of the economists on the ground that the issues were of legal nature only, and therefore expert opinion was not admissible. A few months later the United States Supreme Court in the Maple Flooring and Cement cases recognized the issues presented in these cases as those of economics primarily, and the decision in the Maple Flooring case refers to volume and page of the works of standard writers on economics, just as legal authorities are ordinarily cited. Everywhere the science of economics has received greatly increased recognition in recent years, and it is not too much to say that public opinion may some day require of our legislators and our judges that they be trained in the science of economics as well as in law. Perhaps this was what was in the mind of Colonel William J. Donovan when, in a recent speech to the Pennsylvania Bar Association, he suggested the creation of a separate court for dealing with combinations of industry. Today's problems are those of economics primarily and of law secondarily, yet we are trying to solve them through legislators rather than our economists. If we find we cannot make our legislators and judges into economic experts, perhaps we could succeed in making our economic experts judges and legislators.

We need, too, a more general public interest in the fundamental economic principles. In our form of government we frequently must decide economic policies by popular vote, and the decisions of an uninformed electorate may be based upon partisanship or prejudice. A noted writer said some time ago: "America is a nation of economic illiterates." But a greater public interest in economic trends and economic questions is noticeable, if not yet pronounced. Perhaps the public attitude is being improved, too, by the increasingly wide diffusion of the stock ownership of our principal corporations. There is a growing friendliness on the part of the public toward the larger industries, which is a happy augury, for there have been times in the past when official action against business combinations was prompted not by reason but ill-will. It would seem that, of all the sciences, none has a better chance for popular approval than that of economics, for it is based upon practical reasoning and ordinarily should make confident appeal to the lay intelligence. Our officers need the support of intelligent public opinion, and in the long run will be guided by it. When our people give their earnest consideration and study to the question

of the Government's attitude toward business, we believe they will re-affirm the principle of competitive freedom and economic equality upon which our anti-trust policy is now based and that rather than abandoning it, they will seek the means for making it more truly and more fully effective.

Finally, we submit that happily our nation's well-being does not altogether depend upon governmental orders and decrees. This generation does seem to think that whatever ills we have, they can be cured by statutes, and by nothing but statutes. We will get over that. Many of the strongest weapons in the public's hand, both of offense and defense, do not come from the statutory law. For instance, the public mind was excited recently by the disclosure that the International Paper and Power Company had purchased a number of newspapers. That ownership was certainly not unlawful, nor was it necessarily improper. Public opinion, however, registered an objection and the mere expression of that objection was sufficient to compel a reversal of policy. Public opinion still has a great deal to do with regulation and control. It is still the supreme law.

COÖPERATIVE ENTERPRISE

Frequently, too, the functionings of the economic law can be stimulated by a bit of coöperative enterprise. Some years ago, for instance, the governor of South Dakota found that the retail and wholesale prices of gasoline were too widely apart. He got quick results by purchasing gasoline at wholesale and distributing it at cost. By a simple business proposition, he accomplished what the statutes could not. He resorted to economic forces and brought a new factor into competition. For the idea he was to be greatly commended, but perhaps not for its execution. The same result could have been secured just as well and far more appropriately by any citizens' organization.

Frequently situations may occur where a group of citizens voluntarily coöperating can reach a desired result more quickly and more effectively than could any public officer. There is no reason why the size and strength of their organization could not be commensurate with the need at hand and their methods as flexible as the situation may require.

We mention these only as suggestions to demonstrate the abundance of means, other than commission regulation, for the solution of our industrial and economic problems.

We emphasize particularly the fact that the problems are those of economics and should therefore be solved, if possible, through economic channels and by an extension, rather than a restriction, of the American policies of competitive freedom and equality. Further, as an instrument of social control, the economic law is more potent than the statutes—it needs no enactment and fears no repeal. It is self-enforcing and inexorable. Let the anti-trust laws, present and future, be content with finding the way to provide effective safeguards for the free and unrestrained operation of the economic laws.

Special Privilege Under Our Federal Anti-Trust Laws

By George A. Fernley

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ENACTED in 1890 to meet public demand for protection against practices which were believed to encroach upon and threaten the public welfare, there is no doubt that the Sherman Law served an important and valuable purpose at that time. However, as a result of fundamental changes in American business, the usefulness of that Law is seriously questioned. A considerable body of public opinion is demanding a change which would permit intelligent coöperation for the eradication of uneconomic practices recognized as evils, without the constant fear of prosecution, heavy fines and imprisonment. In fact, need for an equitable and fair modification of the Sherman Law has long been recognized by persons of authority.

Evidence of this is furnished by messages of President Roosevelt to Congress. In 1905 he said:

> It has been our misfortune that the only laws on this subject have hitherto been of a negative or prohibitive, rather than of an affirmative kind, and still more, that they have in part sought to prohibit what could be effectively prohibited, and have in part confounded what should be allowed and what should not be allowed. It is generally useless to try to prohibit all restraints of competition, whether those restraints be reasonable or unreasonable. Where it is not useless it is generally hurtful. This is an age of combinations and any effort to prevent all combination will not only be useless, but in the end, vicious because of the contempt for law which failure to enforce the law invariably produces.

Again, in 1908, he urged upon Congress modification of the Law, declaring:

> As I have repeatedly pointed out, this Anti-Trust Act was a most unwisely drawn statute. It is mischievous and unwholesome to keep upon the statute books unmodified a law like the Anti-Trust Law, which, while in practice only partially effective against vicious combinations, has nevertheless in theory been so construed as sweepingly to prohibit every combination for the transaction of modern business. . . . Congress cannot afford to leave it on the statute books in its present shape.

In August, 1908, during his successful campaign for election, President Taft asserted:

> I am inclined to the opinion that the time is near at hand for an amendment of the Anti-Trust Law, defining in greater detail defaults against it, and its aim, and making clearer the distinction between lawful agreements, reasonably restraining trade, and those which are pernicious in effect.

Emanating from such distinguished authorities, these statements are of striking importance in their relation to the statutory exemptions from the Sherman Law, subsequently granted by Congress to specific branches of American industry.

Opposition Increasing

Opposition to the Law has grown during the succeeding years. A recent report of the Commerce Committee of the American Bar Association condemned it in no uncertain terms:

> The Sherman Law is economic legislation. It can only be helpful if it is subservient and not in opposition to economic laws. A rule of conduct applicable to the simple conditions of English business as conducted hundreds of years ago in a territory no larger than the state of Arkansas may be impracticable when applied under the complexity of conditions now existing in the United States, a territory embracing an area sixty times as large as England.
>
> Not only is the Sherman Law economically unsound, but its application to individual cases is uncertain. The facts constituting unreasonable restraint of trade cannot be catalogued. What is clearly an unreasonable restraint of trade in one case may in another case be a reasonable restraint. The result of such a state of complicated uncertainty is not only to keep men from violating the Law, that is, from entering into agreements unlawfully restraining trade, but to keep men from entering into any agreement restraining trade, even though the restraints be reasonable and, therefore, lawful. Lawful agreements are commendable. If fear of the law keeps men from entering into lawful contracts the public interest is violated. The Sherman Law is the basis of such a fear to an extent that cannot be overstated. It is, therefore, something more than a law—it is a power beyond the law.

The report further states:

> The policy of Congress during recent years, in granting exemptions from the provisions of the Sherman Law to various groups or classes of people subject to it, the establishment by legislative act of a system of regulation of competition, the failure of the Sherman Law as interpreted in this country to recognize economic conditions, the uncertainty of the application of that law in individual cases, the change above noted in the attitude of labor, and the constantly increasing revolt of the people of the country against the inappropriate restrictions of the Sherman Law, give no inconsiderable assurance that in the not distant future some amendments to the Law will be made in the public interest.

Broad Interpretation by Court Decisions

Notwithstanding the fact that the primary purpose of Congress in enacting the Sherman Law was the repression of the powerful trusts then existing, subsequent decisions of the courts have enlarged that purpose so as to bring the Sherman Law squarely within the domain of private business, even where no possibility of the creation of trusts and monopolies exists. For example, in a number of decisions of the courts, the doctrine was definitely declared that where competitors in business entered into agreements for the betterment of their industry, but which agreements necessarily curbed or restrained the full power of competition among the parties to them—a curbing and restraining essentially necessary to correct ruinous conditions of competition which existed—the courts declared such agreements to constitute violations of the Sherman Law, notwithstanding the fact that they were based upon good motives and produced good results. In sustaining this position, the courts declared good motives and good results constituted no defense because Congress alone had the right to determine whether agreements restraining competition were permissible and had declared that they were not.

Countless illustrations could be given in order to show that the result of this doctrine has been to prevent sensible agreements of coöperation among competitors, intended solely for the purpose of correcting conditions of ruinous competition. An example is to be found in the decision of the United States Supreme Court in the Trenton Potteries case. In that case, the Court held that agreements made by a number of competing manufacturers in the pottery industry for the purpose of correcting a state of cut-throat competition which threatened the very existence of the industry, and which agreements provided for uniform sales prices, were unlawful notwithstanding the conceded fact that the sales prices

were entirely reasonable. The decision was based upon the ground that the Sherman Law forbids any agreements of this nature, irrespective of their need. The result of this decision has been most disastrous to every competitive industry in this country.

SUPPLEMENTAL LEGISLATION

In the presidential campaign of 1912, both of the two leading political parties, realizing the urgency for supplemental legislation, incorporated planks in their platforms calling for amendment of the Sherman Law. The result was the enactment in 1914 of the Clayton Law and the Federal Trade Commission Law, for the purpose of clarifying the Sherman Law and rendering it more easy of comprehension and application by business men.

The Clayton Act specifically declares certain practices illegal, but is tempered with "provisos" and "exceptions." It states that it shall

> be unlawful for any person engaged in commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities—*where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*

There was also added the special proviso

> that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the trade, quality or quantity of the commodity sold or that makes only due allowance for difference in the cost of selling or transportation or discrimination in price in the same or different commodities, made in good faith to meet competition.

Further,

> that nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

Having added the foregoing provisos, the framers of the Clayton Act also made certain definite exceptions or exemptions and in the first section of the Law inserted a sentence providing that nothing in the Act shall apply to the Philippine Islands.

EXEMPTIONS FOR LABOR AND AGRICULTURE

In Section VI it was declared "that the labor of a human being is not a commodity or article of commerce," and that nothing in the anti-trust laws shall be construed "to forbid the existence and operation of labor, agricultural or horticultural organizations instituted for the purpose of mutual help." The Law states that such organizations, or the members thereof, shall not be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.

Immunity is granted common carriers in Section VII for the purpose of aiding in the construction of branches or short lines "so located as to become feeders to the main line of the company." Moreover, the Law is not to be so construed as to prevent them from

> acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of the branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property or an interest therein is so acquired.

While expressly forbidding a corporation engaged in commerce from acquiring stock of another corporation also engaged in commerce "where the effect of such acquisition may be to substantially lessen competition" or "to restrain such commerce in any section or community, or tend to create a monopoly," Section VII specifies as another exception that these restrictions

> shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.

Exception is also made in instances where corporations form a subsidiary "for the actual carrying on of their immediate lawful business" when the effect is not to "substantially lessen competition."

MORE EXEMPTIONS

About the same time (1913) Congress passed the Panama Canal Act, which exempted from the restrictions of the anti-trust laws railroads having an interest in competitive water lines.

Having thus broken the legislative ice, additional relief in the form of exemption or special privilege has since been extended to others. In 1916 national banks were accorded special exemptions by the Federal Reserve Act, in connection with business in foreign countries, and the Shipping Act of September 7, 1916, provided exemption and special privilege to American steamship lines. Two years later the Webb Export Trade Act was passed for the purpose of promoting export business and permitted combinations in the development of foreign trade which previously had been denied.

In 1922 the Capper-Volstead Act strengthened the exemptions already extended to the Agricultural interest, specifically declaring that "farmers, ranchmen, dairymen, nut or fruit growers may act together" in collectively marketing their products and "may make the necessary contracts and agreements to effect such purposes." Not only are they thus assured the previously forbidden right of "agreement," but the law goes even further and places in one man, the Secretary of Agriculture, the right to determine whether or not the prices they thus obtain are reasonable.

Investment of such unusually broad power in a single official is provided by Section II of the Capper-Volstead Act, which reads:

> if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing and made a part of the record therein. *If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product*

is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him directing such association to cease and desist from monopolization or restraint of trade.

Exemptions to agriculture were extended by the Coöperative Marketing Act of July 2, 1926, and the industry given additional Federal assistance by the last session of Congress through the creation of the Federal Farm Board.

LAW TEMPERED IN SPECIAL CASES

Not only has it been considered wise and expedient to grant these specific exemptions, but also desirable to temper our anti-trust laws in their application to special industries so that sound regulation could supersede unrestrained competitive practices.

The possibility that our markets could be seriously affected by the unrestrained competition of cheap imported articles was conceded when the Revenue Act of September 8, 1926, was passed. It, therefore, specifically prohibited the dumping on our markets of imported articles at prices substantially less than their actual market value with the object of monopolizing trade, thereby preventing unrestricted competition.

Necessity for regulating the packing and stockyard industries resulted in the passage of the Packers and Stock Yards Act, which specifically lists a number of forbidden practices and invests the Secretary of Agriculture with power to impose its prescribed rules covering the

buying of live stock in commerce for purposes of slaughter; manufacturing or preparing meats or meat food products for sale or shipment in commerce; manufacturing or preparing live stock products for sale or shipment in commerce; marketing meats, meat food products, livestock products, dairy products, poultry, poultry products or eggs.

The same law established a group of definite rules for the operation of stockyards, with power of enforcement in the Secretary of Agriculture.

More recent evidence of the admitted wisdom of exercising just regulation, as contrasted with complete lack of control, or unfettered competition, is found in the passage of the Radio Act of 1927.

INDUSTRIAL ALCOHOL

Another illustration of the admitted necessity for regulation of industry has developed as a result of the passage of the Prohibition laws. Several years ago, the Treasury Department inaugurated the policy of limiting the production of industrial alcohol because it appeared that for some time there had been an overproduction, with the consequent result that a considerable part of the supply in excess of legitimate requirements was finding its way into unlawful channels. It is understood in this connection that alcohol manufacturers agreed to limit their production in 1928 to 87.5 per cent of the amount produced in 1927.

DO EXEMPTIONS GIVE NEEDED RELIEF?

Exemptive legislation is unquestionably a challenge to our anti-trust laws. It is indicative of the development of a pronounced modification of sentiment regarding them, as well as the recognition by Congress that the restrictions imposed almost forty years ago are in many instances no longer in the public interest and that relief is essential. However, special exemptions fail to afford tangible relief to American business as a whole. The granting to a few of special rights and privileges which are denied others is

class legislation, and as such is grossly un-American. It is contrary to the principles of freedom and equality of opportunity upon which our Government was founded. It has no place in our National life, nor can it long endure.

NEW CONDITIONS—CHAIN STORES

The framers of our anti-trust laws quite naturally failed to anticipate certain important trends of business and industry and new forms of competition which subsequently developed. Similarly, they failed to foresee the effect of laws on individual business men under the new conditions because they were without precedent or prior example in the world's history.

The growth of chain stores constitutes an excellent illustration. Today independent merchants are forbidden to agree among themselves upon policies, practices and methods that would be mutually helpful, and which would result in the elimination of economic evils which would enable them to reduce their costs, to operate more efficiently and economically and to serve the public better and at less expense. Deprived of the right to enter into helpful agreements, they are forced to compete with chain stores of as many as two thousand individual units which, through centralized control, are able to eliminate wasteful practices and evils which constantly harass the individual merchant. In other words, centralized control of the chain insures for their separate units economies and benefits which independent merchants cannot enjoy because they are denied the right of agreeing to pursue predetermined policies.

As a result, the future welfare of independent retailers of many commodities, such as tobacco, drugs, groceries, and so forth, is menaced. It has even been asserted that many independent merchants would fare better if they discontinued business and worked for the chains. Nothing could be more un-American than the demand that they sacrifice their independence in such a manner.

MILLIONS WASTED BY UNCONTROLLED PRODUCTION

Prohibition of reasonable agreements for sound and wise control has cost this country untold millions since the enactment of the Sherman Law. Industry has passed through alternating periods of feverish activity and stagnation. Uncontrolled production has resulted in repeated accumulation of vast surpluses far in excess of our requirements or ability to consume and has suddenly converted eras of normal prosperity into periods of depression. It has undermined market stability and caused the sudden and severe collapse of commodity values, forcing business to absorb staggering inventory losses. It has resulted in widespread misery and suffering among the laboring classes of our people. It has wastefully dissipated our vast natural resources and raw material. Conditions in the oil industry constitute a striking and indisputable illustration.

Sharp upward or downward movements in American business recur with such regularity that they have been termed "business" or "economic cycles," and in recent years much attention has been devoted by economists, bankers, industrial leaders and our legislators to methods for reducing their intensity. Revision of our banking system and passage of the Federal Reserve Act was an effort in that direction. It sought to minimize pronounced fluctuations by providing a flexible supply of money to meet our varying requirements for funds.

Such measures have failed, however, to afford proper or adequate relief. Consequently business is endeavoring

to find other methods for solving its problems. In many lines, mergers are at present believed to afford some measure of relief.

MERGERS

Deprived of the right to establish essential coöperative measures for the stabilization of production, distribution and values, industry is turning to amalgamations to place under centralized direction the vast resources and productive capacity of our mines and factories. The logical objective is evident. Economies in management and increased efficiency in operation are assured. In addition, however, amalgamations tend to insure better control of production and lessen the danger of repeated accumulation of vast surpluses, top-heavy markets and price demoralization, with its attendant loss and impairment of capital.

Agreements among competitors which are harmful to the public interest, which unduly inflate the cost of living, which are designed to injure a third party, which seek to monopolize markets or which tend to limit opportunity, should be forbidden. But if, in the light of past experience, our Government in its wisdom sees the necessity for extending exemptions from our anti-trust laws, to certain classes, such as,

Labor
Farmers
Planters
Ranchmen
Dairymen
Nut and Fruit Growers
Railroads
National Banks
American Steamship Lines
Those Engaged in the Export Businesses
Producers of Industrial Alcohol
Philippine Exporters

and if it realizes that unrestricted competition is unwise in special cases, notably in the sale of imported products, in the packing, stockyard and radio industries, and also recognizes the necessity for the creation of agencies such as the Federal Trade Commission endowed with power to regulate competition, why is it not wise to extend the same privilege to others? By what authority does the Government discriminate in favor of some groups and deny the same rights to others? Why are labor and farmers entitled to more consideration than employers and manufacturers? Surely it is time to abandon the subterfuge that has existed and place all business on an equal basis.

The World War demonstrated the lack of foundation for many of our fears about the danger of agreements in reasonable restraint of trade, and coöperation among competitors. In order to meet the abnormal conditions then existing, special regulations, and in some cases, forms of price-fixing were freely employed. They inflicted neither public nor private injury. In fact, we experienced the most prosperous era in our history. Why, then, should we continue to deprive independently owned units of the right to coöperate for their common good and for the public welfare in normal times, instead of continuing the pernicious policy of class legislation and special exemption for selected or privileged groups?

In the report of the Committee on Commerce of the American Bar Association, to which reference has previously been made, it is further stated:

> It is interesting to note that the McNary-Haugen Bill recently passed by Congress, but vetoed by the President, granted exemptions from the provisions of the Sherman Law to the special interest which originally proposed its enactment. The desire of the agricultural bloc to nullify provisions of the Sherman Law when applied to it, is indicative of a like desire on the part of large numbers and classes of our people. . . .
>
> Legislation of recent years clearly indicates that Congress no longer conceives unrestricted competition as necessary in the public interest. . . . Exemptive legislative enactments above referred to not only reflect a changed public sentiment with reference to the Sherman Law, but are made possible because of the recognition by our legislative body of the well-established fact that business today is conducted on a higher moral plane than ever before.

It seems obvious, upon the basis of the concessions made by Congress itself in granting statutory exemptions to specific branches of American industry, that like relief should be afforded to every branch of American industry, so that while trusts and monopolies as well as agreements among competitors which are truly harmful to the public interest should continue to be forbidden, nevertheless, in accordance with the wise counsel which has been quoted from the statement made by the present Chief Justice, the Sherman Law should be amended so as to permit reasonable agreements for the correction of harmful conditions which are now causing such great damage to the competitive industries of this country, and especially the individual business man.

If, however, this is not considered practical from a political or economic standpoint, there should be created a board, court or commission to which business men may refer their proposed plans or policies for the purpose of determining in advance their legality, as has been suggested recently by several leading authorities after close and thorough study of existing conditions. Such a commission should not be invested with unwise bureaucratic powers, but function solely for the purpose of aiding individual business men and placing them on a basis more closely approximating that of those favored by exemption from the terms of our anti-trust laws.

The public interest, vastly changed conditions, and increasingly keen competition, not only between our own industries but also from foreign countries, which lack restrictions similar to those imposed by the Sherman Law, imperatively require the liberation of independent and individual business men from the fear which now restrains them from necessary coöperative endeavor essential to their future success.

The Relation of Patents to Industrial Monopolies

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PATENTS have been used to further the restraint of trade and the creation of industrial monopolies. The exploitation of patents in this fashion has been most pronounced since the passage of the Sherman Act in 1890. Many corporations have sought to evade this Law, together with the Clayton Act of 1914, both of which denounce restraint of trade and monopoly. Some of them have proceeded on the assumption that patents might lend legal immunity to their designs because patents themselves confer legal monopolies—the exclusive right to make, use and sell. Patents have been used to defeat the purpose of the anti-trust laws by means of pools, consolidations and unfair competition, all three of which will be described and discussed in this article.[1]

The Patent Pool

A patent pool is an arrangement by which former competitors partake of the privileges conferred by one or more patents according to some prearranged basis designed to restrain trade. The pool, the typical form of combination during the early nineties, was employed by the owners of patents, as well as others, in trying to eliminate competition.

Those in control of the patents of pools may be grouped according to whether they are assignees or owners, individuals or companies, manufacturers or mere possessors of patents. In some instances an assignee controlled the patents; in others, the owners of them. The Consolidated Seeded Raisin Company and the Motion Picture Patents Company illustrate the former, and the Rubber Tire Wheel Company and Indiana Manufacturing Company, the latter. In one instance—the liquid door check combination—various owners of patents pooled them by agreement and without assignment. In the bathtub pool an individual controlled the patents; in other pools, a company. Those in charge of the patents of the rubber tire and coaster brake pools were also engaged in manufacturing the products covered by the respective groups of patents; whereas those in control of the patents of the harrow, seeded raisin, wind-stacker, bathtub and motion picture pools confined themselves to the possession of patents and the supervision of licensees.

Types of Pools

The details of patent pools differed as to the number of business units that contributed patents to further this form of combination. The Rubber Tire Wheel Company and the Indiana Manufacturing Company were the sole owners of patents in the rubber tire and wind-stacker pools; the former used one patent as the basis of license agreements, while the latter employed several patents. Two or more concerns, but not all the members of the pool, furnished patents as a basis for the arrangement in the bathtub and motion picture pools. Each member contributed one or more patents in the harrow, seeded raisin, liquid door check and bathtub pools. Not all of the patents pooled, however, were necessarily used as a basis for license agreements; for example, in the bathtub pool, although three companies assigned their patents, only one of them was employed. In the harrow pool, each company received licenses based only on the patents it assigned, whereas in the other pools all the members partook of the rights of the same patents.

The National Harrow Company of New York was

> a combination of six manufacturers of harrows for the purpose of holding patents and licensing the respective manufacturers under them. Eighty-five patents were acquired by assignment from the several manufacturers.[2]

The National Company acquired control of most of the spring tooth harrow business in the United States and maintained this position for several years.

In 1900, eight manufacturers engaged in seeding and processing raisins assigned their respective patents relating to this art to the Consolidated Seeded Raisin Company, a mere dummy, and received in return uniform licenses based upon all of them. The licenses declared this corporation or licensor the owner of these patents, and required it to inspect the books of the licensees and to prosecute infringers of the patents; it imposed upon the licensees the payment of royalties and also certain conditions as to the use and ownership of the patented machines, prohibiting their use of any others. Moreover, the licensor agreed not to license other parties without the consent of one-half the licensees: a committee of four was to decide to whom licenses should be issued.

One of the manufacturers, charged with a violation of the license agreement, pleaded the illegality of the contract. A Circuit Court of Appeals recognized the legal right to convey patents covering similar inventions to a single patentee, who then issues licenses upon them to their owners.[3] It based its argument upon *Bement* v. *National Harrow Company;* but in that case, only the relation of a patentee to a licensee entered. Therefore, it was illogical to employ that decision as a criterion in the present case, in which the owners of patents for similar inventions assigned them to a single company and received in return licenses based upon all patents thus pooled.

The Rubber Tire Wheel Company, the owner of a patent on rubber tire wheels, entered into uniform license agreements with eighteen—practically all—of the manufacturers of tires in the United States. The contract provided for a considerable advance in the selling price of tires, and limited the production of each licensee to a certain percentage of the output of all. The company brought suit against one of the licensees to recover unpaid royalties. A Circuit Court of Appeals held that the requirement that the licensee join other licensees in a combination or pool to control prices and output of an innocuous article does not violate the Sherman Law.[4] Later this case reached the United States Supreme Court, where it was dismissed, per stipulation.[5]

The Indiana Manufacturing Company gradually acquired practically all patents pertaining to wind or pneumatic straw stackers, and issued uniform licenses to all the manufacturers of threshing machines in the country. They were given the right to use any

[1] Much of the material in this treatise is taken from Vaughan, *Economics of Our Patent System* (Macmillan).

[2] House Report (minority) No. 1161. 62nd Cong., 3rd Sess. (1913), pt. 2, p. 3.

[3] 126 Fed. Rep. 364, C. C. A. (1903).

[4] 154 Fed. Rep. 358, 363.

[5] 210 U. S. 439 (June 1, 1908).

and all inventions covered by such patents and by any other patents subsequently acquired. The company stipulated a uniform price for its product and the payment of a royalty.

This company brought suit against the Case Manufacturing Company for infringement of its patents and violation of the license agreement between the two companies. A Circuit Court pronounced the Indiana Company the promoter of a two-fold combination of numerous patent properties and of all manufacturers of threshing machines, which made its agreement with the licensees illegal.[6] A Circuit Court of Appeals rendered a decision diametrically opposed to that of the Circuit Court. The judge who wrote the opinion was the same one as in the rubber tire case, and his argument was much the same. Both decisions were promulgated the same day.[7] The case, after an appeal to the Supreme Court, was dismissed, per stipulation, at the request of counsel, December 16, 1907, without cost to either party.[8] In the interim—between the appeal and the dismissal—the directors of the Case Company had purchased a majority of the stock of the Indiana Company and thus had acquired control of it, a fact which partly explains the interest of both parties in dropping the suit.[9]

The Blount Manufacturing Company and the Yale and Towne Manufacturing Company, the owners of patents on liquid door checks, together with two kindred manufacturers, entered into contracts which restrained each other in the exercise of rights conferred by their respective patents and authorized each of them to use the patents of the others. The plan comprehended, in the language of the Court, "the maintaining of prices, the pooling of profits, the elimination of competition and the restraint of improvements."[10] The Yale and Towne Company, sued for violating the agreement, pleaded its illegality. This, according to the Court, involved the following question: Is the Sherman Act inapplicable because the agreements related to articles embodying patented inventions? It held that the patentees passed beyond the exclusive right to make, use and vend—all that the patent statute confers—by combining or pooling their patents, and hence violated the Sherman Act.[11]

The Standard Sanitary Manufacturing Company and two other manufacturers of enameled iron ware—the J. L. Mott Iron Works and the L. Wolff Manufacturing Company—assigned their patents for an enameling process to the secretary of the association of enameled ware manufacturers; and on the basis of one of them—the one assigned by the Standard Company, the others being regarded as infringing patents—he issued licenses to manufacturers of enameled ware and jobbers in this commodity, which brought eighty-five percent of the former and ninety percent of the latter into a network of license agreements. According to these contracts, a committee of six, chosen from the manufacturers entering the combination, determined the selling prices of both manufacturers and jobbers. They also provided for territory pools, for the payment of royalties and for rebates and penalties to prevent the violation of the license compact. The manufacturers could sell their enameled ware only to those jobbers belonging to the combination; while the latter could buy such goods only from the former.

The Standard Company, charged in a Circuit Court with a violation of the Sherman Act, pleaded that the combination was immune from this Law because it was based upon a patent. The Supreme Court, to which the case was appealed, concluded that this monopoly arose primarily from combination, and hence condemned it as it had other combinations that had violated the Sherman Act.[12]

Ten manufacturers of motion picture films sought to dominate the motion picture business, including its three phases of manufacture, distribution and exhibition. The subterfuge consisted of a patent pool. They organized the Motion Picture Patents Company, to which four of them assigned several patents. These patents were used by this company as a "legal" basis for interlocking licenses granted not only to manufacturers of motion picture films and projecting machines, but also to distributors and exhibitors of these films. By leasing instead of selling films, and by enforcing stringent restrictions and conditions pertaining to them, the control of the motion picture industry seemed assured. Competition was practically eliminated both from within and without the combination. For example, no two distributors could supply films to the same exhibitor, and the various strata of the industry were compelled to use all, or none, of the machines and films of the monopoly. Moreover, contracts, royalties, penalties, and so forth—all prescribed by the Patents Company—were uniform as between any two of the four factors in the monopolistic hierarchy, namely, the Patents Company, manufacturers, distributors and exhibitors. Further, a manufacturer could not distribute or exhibit films, a distributor could not make or exhibit films and an exhibitor could not make or distribute films—a situation which brought about functional specialization within the industry. The Government, as one would expect, brought suit against this monopoly for violation of the Sherman Act. A District Court held that the combination was illegal.[13]

The New Departure Manufacturing Company and five other corporations were separately engaged in different states in the business of manufacturing bicycle and motorcycle coaster brakes and accessories, of a distinctive type and design from those made by other concerns, under certain patent license rights owned by them separately. By granting licenses to competitors, they sought to restrain trade in coaster brakes. A District Court in 1913 pronounced the scheme illegal.[14]

In June, 1924, the United States brought suit against the Standard Oil Company of Indiana, the Standard Oil Company of New Jersey, the Texas Company, the Gasoline Products Company and forty-seven other oil concerns.[15] The defendants, according to the Government's brief, had formed a patent pool for the purpose of restraining trade in gasoline, kerosene and other hydro-carbon products. The patents in question related to the "cracking" processes of making gasoline. At this time, in 1929, no final decision has been rendered.

[6] 148 Fed. Rep. 21, 25–26 (Aug., 1906).

[7] 154 Fed. Rep. 365 (Apr. 16, 1907).

[8] 207 U. S. 603.

[9] The Bureau of Corporations conducted an investigation and presented a report in March, 1915, on Farm Machinery Trade Associations, one chapter of which is entitled "Concentration in Ownership of Wind-Stacker Patents." This contains a detailed statement of the origin and development of the Indiana Company and the relations between this concern and its licensees, the Case Company in particular. This chapter substantiates and supplements the facts presented in the judicial decisions already examined.

[10] 166 Fed. Rep. 555, 556, C. C. (Jan., 1909).

[11] *Ibid.*, 557–58.

[12] 226 U. S. 20.

[13] 225 Fed. Rep. 800 (Oct., 1915).

[14] 204 Fed. Rep. 107.

[15] *U. S.* v. *Standard Oil Co.* (Indiana), *Standard Oil Co.* (New Jersey), *Texas Co., Gasoline Products Co., et al.* In the District Court of the U. S., Northern District of Ill., Eastern Div. (1924). Government's petition.

According to a report of the Federal Trade Commission in 1923, the Radio Corporation has entered into agreements with the various companies which own or control practically all patents covering radio devices considered of importance to the art. With certain minor limitations, it has secured, under these agreements, an exclusive divisible right to sell and use the radio devices covered by the patents involved, or by patents which these companies may acquire before the termination of the agreements.

DIRECT OWNERSHIP VERSUS POOLS

The instability and illegality of patent pools indicated the necessity of other forms of organization. These defects, it seemed, could be avoided by the outright ownership of all patent rights pertaining to a particular industry. Two general methods of carrying out this scheme may be distinguished. The first consisted of the consolidation of former competitors. One corporation, according to this plan, acquired completely the plants, patents, and so forth, of competitors. Without patents the result would have been monopolistic in character; with patents, it was assured of the strength of its position. Competition could not appear readily because a competing line of inventions, as well as a large supply of capital, would be necessary. The other method was the purchase only of the patent rights of individuals and companies, without any attempt to acquire the plants of competitors. This method was most expedient and effective for a concern which already occupied a prominent position in its field. By acquiring the patents of others it ultimately attained a monopoly. These two methods—the consolidation of companies possessing patents, and the securement of patents only from miscellaneous sources—were employed at the same time in some instances. For example, the Eastman Kodak Company purchased the plants, patents, and so forth, of other companies, at the same time that it acquired patents from individuals and others. Furthermore, the second method was usually a sequel of the first. After the consolidation of various companies it was necessary, in order to perpetuate its monopolistic power, to acquire other and relevant patents.

The primary reason, of course, for acquiring patents in this fashion is the securement and perpetuation of monopoly. Other reasons are: to prevent the scrapping of existing equipment; to perfect machines, processes, and so forth, by combining inventions; and to avoid litigation.

The industrial monopoly usually purchases its patents at bargain prices. It enjoys a monopoly in buying patents that relate to the particular industry and, therefore, can practically dictate their prices. Moreover, it controls basic and important improvement patents. Improvements cannot be legally used in connection with them without its consent. Thus, the corporation has an additional advantage in bargaining with those who have made slight improvements. Further, the amount and expense of patent litigation serve as a handmaid to the large corporation in quest of patents. As Edison has stated:

> The long delays and enormous costs incident to the procedure of the courts have been seized upon by capitalists to enable them to acquire inventions for nominal sums.[16]

Another source of inventions, especially of those that insure the continuation of the monopoly, is the corps of employed scientists and inventors.

[16] Oldfield Hearings of 1912, No. 23, p. 32.

These men usually receive fixed salaries for their inventive endeavors in return for the assignment of patents covering their inventions to their employer. Further, a concern may require its laborers to agree to assign to it any inventions which they may conceive while in its employ. These two classes —professional inventors and employees —bring forth most of the inventions; thus, by controlling this fountain of inventive genius, it is possible for a company to perpetuate its monopoly of patents pertaining to a particular industry.

Some of the experts of the "patent" trust who further its designs to continue its monopolistic power are former examiners of the Patent Office. According to the Commissioner of Patents in 1919, some of these men resign from a division and go into practice for a corporation having applications in that same division. They are not only familiar with all its applications for patents, but they have studied the cases of rival companies or of independent inventors.[17]

The American Tobacco Company, dissolved in 1911 by the Supreme Court, acquired several patents pertaining to the tobacco industry. It secured control of the patents of the Bonsack, Allison and Emery machines for making cigarettes. It dominated the cigarette business first owing to

> the special adaptability of cigarette making to the use of machinery, the exceedingly rapid growth of the cigarette industry, its concentration in a few large factories, the intensity of competition among these, and the control of the best cigarette machines by a few men through patents.[18]

The American Steel and Wire Company furnishes an excellent illustration of an industrial monopoly built up largely through the control of many patents. The chairman of the company once testified: "We claim a perfect right to put any price on barbed fence wire." At that time his company controlled eighty-five percent of the manufacture and sale of barbed wire in the United States. In justifying the high price of this commodity he said:

> But our control has been acquired by patents, which we have either gone and bought in the open market or paid others for, and we have paid out—in purchases of patents and in the litigation to establish them in the last twenty years—I should suppose, $5,000,000 or $6,000,000.

By means of patents, it also acquired a monopoly of woven wire fencing. As the same individual stated: "We claim a monopoly under patents of most of the woven wire fencing."[19] One cannot find a better illustration of the abuse of the patent system than the practice of this company in acquiring an aggregate monopoly of what might otherwise have been a set of individual monopolies in competition with each other.

In 1899 the United Shoe Machinery Company acquired all the stock of seven shoe machinery companies engaged in making lasting, welt-sewing, outsole-stitching and other machines for the manufacture of shoes. Later it obtained the shoe machinery business and assets of fifty-seven individuals, partnerships and corporations. In addition, the United Company sought to acquire the patent rights and inventions of professional inventors and employees. It contracted with ninety-five percent of the inventors of shoe machinery for the entire product of

[17] Nolan Hearings of 1919, p. 241.

[18] Report of the Commissioner of Corporations on the Tobacco Industry, pt. I, p. 63.

[19] U. S. Industrial Commission, Rep. (1900), vol. I, pp. 1009, 1010, 1033.

their inventive skill.[20] Further, its employees agreed to assign to it all their inventions pertaining to shoe machinery which they might conceive while in its employment.

The history of the United Company —the original consolidation of seven shoe machinery companies, the fifty-seven other acquisitions and procurement of the patents of professional inventors and employees—suggests that its policy was to obtain practically all patents relating to shoe machinery, in other words, to acquire a monopoly of individual monopolies relating to a particular industry. Moreover, it leased its machines subject to "tying" clauses, which compelled the shoe manufacturer to obtain either all, or none, of the shoe machinery required in his factory from this company.[21] In order to compete effectively with the United Company it was necessary, in view of its control of shoe machinery patents and its system of tying clauses, to invent shoe machines and perfect others—in other words, to offer a complete and new line of shoe machinery to the shoe manufacturers.

The patents and the tying clauses of this corporation enabled it to control more than ninety-five percent of the entire business of shoe machinery in the United States.[22] It was the only company which manufactured a full line of shoe machinery.

In the growth of the American Can Company patents played a secondary rôle, though not an unimportant one. In 1901 it acquired the plants, machinery, patents and other property of 113 concerns, the great majority of which were manufacturing cans for sale. Most of the others of any importance were engaged in the manufacture of can-making machinery or owned valuable patents for such machinery. All of these companies made about ninety percent of the cans then manufactured for sale in the United States. The American Can Company thus sought to monopolize the tin can industry by acquiring control of the manufacture of cans and can-making machinery. In this way, existing competition would be largely removed and the possibility of future competition lessened. But, many competitors sprang up through the inducement of high profits, until in 1913 the company controlled only about fifty percent of all tin cans manufactured for sale. The United States brought suit against the company, charging it with a violation of the anti-trust laws. A District Court, in 1916, holding that its dissolution would serve no public interest, allowed the suit to stand open until future events and actions should warrant a definite decision.[23]

In 1915 the A. B. Dick Company controlled, in money value of sales, approximately 85.1 percent of the commerce of the United States in stencil duplicating machines, approximately 88.2 percent of such commerce in stencil duplicating paper and approximately 79.9 percent of such commerce in stencil duplicating ink.[24] The patents of this company, 128 in all, were originally issued to about thirty different inventors: sixty-seven of them to A. B. Dick, and the remainder to other individuals. The fact that nearly one-half of these 128 patents were issued to other parties, later coming into the possession of the A. B. Dick Company, points to a policy of acquiring any and all patents pertaining to duplicating machines and supplies so as to secure a monopoly of them.

Within about fifteen years the Eastman Kodak Company acquired some twenty competing concerns in the United States. The plants were dismantled and their business discontinued or transferred to the Eastman plants in Rochester, New York. The officers and partners of these corporations and partnerships agreed not to engage in competing business for periods of from five to twenty years. Also, the Eastman Company, by contract with the makers,

> obtained entire control in the United States of the imported raw paper which was recognized as the only standard paper for the manufacture of photographic printing-out paper, and by refusing to sell to other manufacturers compelled several competing companies to sell or go out of business[25]

The Government, in its suit against the Eastman Company for violation of the Sherman Law, secured a favorable decision from the District Court. The tribunal held that there was nothing illegal in the way in which the Eastman Company acquired its patents on cameras and films. It stated in 1915 that this company, by using unlawful methods, controlled approximately seventy-five percent of the interstate trade in cameras, films, plates and photographic paper; and therefore violated the Sherman Act.[26] In 1921, after an appeal to the Supreme Court, the Federal judge in Buffalo, where the case was first heard, directed the dissolution of the company.

The General Electric Company represents a consolidation of a large number of concerns that were originally small. In acquiring these concerns, it secured, of course, all their patents. In addition to maintaining a corps of inventors, this company has bought patents from others apparently for the purpose of preventing competition with its own product. From 1897 to 1911, the General Electric Company and the Westinghouse Electric Company maintained an agreement called the "board of patent control." They both agreed that neither one of them would acquire any license under any patent, except by giving at the same time an option for the term of six months, by which the other one would get a license on the same terms.[27]

METHODS OF UNFAIR COMPETITION

The patent "trust" has employed various methods of competing unfairly—of seeking to destroy competitors and discourage would-be rivals, regardless of their efficiency. They include exclusive agreements, dictation of supplementary supplies, control of complementary goods, maintenance of re-sale prices, threats, groundless litigation, intentional infringement, "dragnet" applications, false marking and piracy.

The Motion Picture Patents Company, in 1919, granted to the Eastman Kodak Company the exclusive right to manufacture its sensitized films. With a few minor exceptions, the Eastman Company agreed not to sell them to any but licensees of the Patents Company. This exclusive contract gave a *buying* monopoly to the Patents Company and a *selling* monopoly to the Eastman Company. It confined the market for films, from the standpoint of both

[20] *United Shoe Machinery Company* v. *La Chapelle*, 99 N. E. 289, 290. Illustrations of this policy may be found in the dissenting opinion of Justice Clarke in 247 U. S. 32, 84–85 (May, 1918).

[21] The interpretation of these clauses by the courts is presented later.

[22] *U. S.* v. *United Shoe Machinery Co.*, 264 Fed. Rep. 138, 163.

[23] *U. S.* v. *American Can Co.*, 230 Fed. Rep. 859.

[24] Annual Report of the Federal Trade Commission (1917), Exhibit 5, p. 61. The "mimeograph" is the principal type of duplicating machine.

[25] *U. S.* v. *Eastman Kodak Co.*, 226 Fed. Rep. 62, 62–63.

[26] 226 Fed. Rep. 62, 79–80.

[27] Oldfield Hearings of 1912, No. 3, p. 23.

selling and buying, to these two companies. The whole arrangement tended to preserve their power, regardless of their efficiency, and to discourage the development of other film companies and manufacturers of motion pictures. The District Court, which declared that the Eastman Company violated the Sherman Act, held that this exclusive contract was not unlawful in that it did not bind two competing companies and therefore did not restrain trade. [28]

The exclusive right to use, which a patent confers, has been exploited in the past by imposing certain conditions which unduly extended the monopoly granted by the patent law. The best known instance of this arose from the practice of the A. B. Dick Company in selling its machine with the restriction that "it may be used only with the stencil paper, ink and other supplies made by" that company.[29] The restriction appeared in the form of a printed notice affixed to each machine. The Supreme Court, in 1912, upheld its legality, and thus furnished a legal foundation to a monopoly in both patented and unpatented goods.[30] Five years later, however, it reversed this decision in the projecting machine case; [31] and thus, by pronouncing the illegality of all attempts to dictate the supplementary supplies of patented articles, brought to an end an acquisitive practice of many manufacturers of patented articles that had prevailed since the early nineties.

The former "tying" clauses of the United Shoe Machinery Company illustrate the control of complementary goods. Apparently they were designed to compel the shoe manufacturers to use exclusively the machines and repairs of the United Company. This corporation, by means of patents, controlled the manufacture of lasting machines, which were essential in the manufacture of shoes. But a shoe manufacturer, in order to use the lasting machine of the United Company, had to consent to use exclusively the stitcher, welter, metallic-fastener and other machines of this company. In effect, he had the choice of obtaining from this company either all, or none, of the shoe machinery required in his factory. No other company could furnish a full set of shoe machinery. It was necessary, therefore, to use exclusively the machines of the United Company in order to engage in the manufacture of shoes. "It is hard to see how the ingenuity of man could have devised a scheme that would more effectually create a monopoly." [32] The Supreme Court, in 1918, held by a vote of four to three that the tying clauses of the United Company were in conformity with its patent rights. The Clayton Act of 1914 played no part in the decision, as the Government instituted the suit prior to its passage. After its enactment, the Government brought suit against the United Company, and the Supreme Court held that the tying clauses were contrary to the "broad terms of the Clayton Act, which cover all conditions, agreements or understandings of this nature." [33]

In 1896 a Federal court, for the first time, sanctioned the patentee's dictation of supplementary supplies for his invention.[34] It was thought that this interpretation of "the exclusive right to use" would justify analogous restrictions concerning re-sale prices based upon "the exclusive right to sell."

[28] 226 Fed. Rep. 62 (Aug., 1915).
[29] Appeal from Circuit Court (Jan. 11, 1907), 149 Fed. Rep. 425.
[30] 224 U. S. 1.
[31] 243 U. S. 502.
[32] 227 Fed. Rep. 507, 511.
[33] 258 U. S. 451.
[34] 77 Fed. Rep. 288.

Therefore, scores of manufacturers sought to dictate the re-sale prices of their patent products. The lower courts, beginning in 1901, generally upheld the legality of this practice until the Supreme Court decided otherwise. In 1913, in the Sanatogen case, it invalidated the printed restriction as to the re-sale price. [35] Later, the Supreme Court rendered two similar decisions involving the same issue.[36]

Threats of infringement suits are often made in bad faith:

> It has been a somewhat common practice for manufacturers of patented articles to prevent the sale of a competing article by circulating broadcast threats to sue for infringement all dealers handling these articles. Such a campaign against a competitor is usually begun by circularizing the trade generally, and in particular the customers of the competitor whose business it is sought to injure or destroy, stating that the competitor's article is an infringement of the writer's patent and that suits will be instituted against all dealers handling the infringing article; and letters of this description are frequently supplemented by oral statements of traveling salesmen.[37]

The test of good faith, according to the courts, is the institution of legal proceedings to determine the infringement.

Infringement suits may not be brought in good faith. A powerful corporation, for example, may institute proceedings in order to enmesh a small competitor in a network of expensive and vexatious litigation, with the hope and expectation of weakening him, of acquiring his patent rights or, perhaps, of buying his business at a low figure.

The intentional infringement of patents arises from a desire to harass, intimidate and weaken a competitor. A recent Commissioner of Patents stated:

> When he [the patentee] gets out his patent, if it is a good thing and he does not succeed in making arrangements with people who will take it up satisfactorily, he is face to face with an arrangement which is frequently carried on by concerns that are created merely for the purpose of infringement, and with the determination to go into the hands of a receiver if they are brought to book.[38]

Many of the interferences are due to "dragnet" applications, which serve the purpose of "scooping" up subsequent inventions. A corporation may purposely delay the granting of a patent so as to entangle a rival inventor in expensive interference proceedings, with the hope and expectation of forcing him either to abandon his invention or to sell it at a nominal price. In 1912 a Commissioner of Patents stated that various concerns had thousands of dragnet cases in the Patent Office, and that they do not take out patents unless some rival concern files an application.[39]

The expressions, "Patent Applied For" and "Patent Pending," have been exploited. In this connection, a recent Commissioner of Patents stated:

> It frequently happens that devices for which no application for patent has been made are marked "patent applied for," and also that to devices for which application for patent has been made and the application refused and finally abandoned, the same legend is still applied. My attention has also recently been called to the fact that certain attorneys who are employed by applicants to make a preliminary search to determine whether or not a device is patentable will advise their clients that in their opinion the device is not patentable,

[35] 229 U. S. 1.
[36] 243 U. S. 490; 246 U. S. 8.
[37] Memorandum on *Unfair Competition at the Common Law* (1916), p. 141.
[38] Oldfield Hearings of 1912, No. 10, p. 27.
[39] Hearings before the House Committee on Patents (Jan. 31, 1912), p. 66.

but that if they desire protection they will file their application in order that they may mark the articles "patent applied for," which they advise them will afford almost the same protection as if the articles were actually patented. This, of course, is clearly an intent to deceive the public, since the applicant, acting on the advice of the attorney, has reason to believe that he cannot obtain a patent upon the article which he marks "patent applied for." Applications of this character are, of course, held pending in the Patent Office as long as possible, in order to afford the applicant as "great a measure of protection as possible."[40]

A patentee may be deprived of the value of his invention by other patents that either obstruct or circumvent his invention. The resort to "obstructive" or "dog-in-the-manger" patents may render the invention of a competitor unfit to use. Thus, an individual wrote, in 1914, to the Senate Committee on Interstate Commerce:

> I have in mind now the case of a corporation which maintains a corps of patent experts and mechanics who are employed for the purpose of studying machines and devices produced by its competitors, and then, before such machines and devices can be worked out and improved to the point of completion, they are "covered up" by numerous applications for patents, which make it difficult, if not impossible, for the competitors to perfect and market their own devices.[41]

[40] Oldfield Hearings of 1912, No. 1, p. 10.

[41] Hearings before the Senate Committee on Interstate Commerce. 63rd Cong., 2nd Sess., Trust Legislation, vol. 2, p. 1078.

Trade Union Activities and the Sherman Law

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BETWEEN 1800 and 1840 there were criminal prosecutions in several states against trade unions in connection with strikes for higher wages. The decisions of the courts upholding these prosecutions were based either upon the theory that a strike amounted to a common law restraint of trade or on the ground that strikes were conspiracies to violate English statutes regulating wages, brought over to this country in the body of law which was effective in colonial days and remained so until changed by our constitution or laws. In 1842 the Boston Journeymen Bootmakers' Society was prosecuted for a criminal conspiracy, in that its members engaged in a concerted quitting of labor in order to enforce a closed shop.[1] Lemuel Shaw, the able Chief Justice of Massachusetts, after writing a clear analysis of the law of conspiracy, found that there was nothing criminal in a combination of workmen to refuse to work in any shop where anyone was employed who was not a member of the combination, and that in the absence of proof that the combination attempted to enforce this rule by acts of coercion and intimidation there was no evidence of unlawful object or lawful object sought to be attained by unlawful means and, therefore, no conspiracy. The able opinion rendered by Shaw in this case seems to have put an end to all prosecutions against trade unions, on the ground that a strike constituted in and of itself a criminal conspiracy at common law. Indeed, it was not until 1886 that the idea was again resorted to that any of the activities usually associated with the strike may constitute a conspiracy. From then on, however, the activities of trade unions have been repeatedly challenged, on the ground that they violated civil or private rights and that their activities in particular cases, either because of the objective of the strike or the means by which it was carried on, constituted a civil conspiracy.

Such was the state of the law when the Sherman Act was passed. That Act condemns as unlawful a combination in restraint of interstate trade. It does not qualify the condemnation, punishing one form of restraint and excusing another, nor condemning a restraint for one purpose and condoning it for another.

Obviously, no combination sets out to restrain trade merely for the fun of it. Each combination has an objective, concealed or apparent, worthy or unworthy, wise or unwise. But the Law says nothing about such objectives or the considerations which might, in the absence of restraint of trade, commend a particular combination to the favorable consideration of public opinion and the finding that its objects are consonant with public policy. In respect, therefore, of restraint upon interstate commerce, no end justifies this means. Where, therefore, it is represented to a court that a combination of wage earners is engaged in practices which restrain interstate commerce, the ultimate objective of the combination, either to raise wages, shorten hours, strengthen the union or otherwise advance the interests of wage earners as a class or

[1] *Commonwealth* v. *Hunt*, 45 Mass. 111, 4 Met. 111.

some particular group, can have no weight with the court. It is clearly and concisely set forth by the Law that the United States cannot suffer individuals or groups to achieve their purpose, however legitimate, by interfering with the flow of interstate commerce. Public interest forbids it.

What constitutes restraint of trade? This is a question for the courts and one which is not always easy to decide. Since the declaration by the Supreme Court that the term "restraint of trade" is to be interpreted in conformity with the common law, where the restraint is incidental the Law does not apply.

Where a trade union makes it its business to interfere with the sale in interstate commerce of the products of a manufacturer, whatever may be its reason for doing so, it intends to restrain his interstate trade, and the combination is unlawful. Where, however, the activities of the combination are not directed immediately at his interstate trade, but are directed at his manufacture of goods for interstate commerce or some other activity from which develops an incidental or indirect restraint of his interstate trade, the Law does not ordinarily apply. With this statement of the principles involved, let us turn to some of the actual cases which have arisen to see just how trade union activities come into conflict with the Sherman Act.

INTERFERENCE WITH TRANSPORTATION

The first clash between trade unions and the Sherman Act came in 1893. A sympathetic strike was inaugurated in New Orleans to tie up all business and commerce until such time as demands of draymen should be met.[2] Stevedores were withdrawn from the ships and the flow of foreign and interstate commerce through New Orleans was stopped. The United States applied to the District Court for an injunction. The decree was granted. Summarizing the issue, the Court said:

> The combination setting out to secure and compel the employment of none but union men in a given business as a means to effect this compulsion finally enforced a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the city of New Orleans from state to state and to and from foreign countries. When the case is thus stated—and it must be so stated to embody the facts here proven—I do not think there can be any question but that the combination of the defendants was in restraint of commerce.

The following year was one of wide disturbance in the railroad industry and the year of the strike of the American Railway Union, under the leadership of Eugene Debs. In support of the employees of the Pullman Company in a controversy with their employers, Debs undertook to force all railway lines to refuse to carry Pullman cars. The tie-up, attended by great disorder, was highly effective. Troops were mobilized, but troops do not run trains, and the strike leaders were still unhampered, meeting with their followers and demanding their fidelity to the strike. The Government applied for an injunction, predicating its case, among other grounds, upon the Sherman Act. The order was granted and was effective in destroying the machinery of the strike. Debs violated the order and was arraigned for contempt. At his trial it was urged that the order was invalid because the Sherman Act did not forbid a combination of workmen whose activities restrained interstate trade, because the Act, if properly construed, applied only to combinations of capitalists. The Court, in its opinion, discussed the meaning of the language of the Act, declaring illegal "every contract, combination in the form of trust, *or otherwise*, or conspiracy in restraint of trade or commerce among the several states," and in rejecting the limited construction of the Act contended for by the defendants, said:

> The facts of this case suggest illustrations of the impropriety as well as inconsistency of putting upon the statute the restrictive construction proposed. If, for example, the manufacturers of other sleeping cars, in their own interest, should enlist the brakemen and switchmen or other employees of the railroads, either individually or in associated bodies, in a conspiracy to prevent or restrain the use of Pullman sleepers, by refusing to move them, by secretly uncoupling, or by other elusive means, the monopolistic character of the conspiracy would be so evident that, even on the theory that the statute is aimed at contracts or combinations intended to engross or monopolize the market, it would be agreed that the offense ought to be punishable. But in such a case if the officers or agents of the car companies, who might or might not be capitalists, would be individually responsible for violating the statute, upon what principle could the brakemen or switchman be exempt? Can workingmen, or, if you will, poor men, acting by themselves, upon their own motion and for their own purposes, whether avowed or secret, do things forbidden by the statute, without criminal responsibility, and yet be criminally responsible for the same things done at the instance and to promote the purposes of others? Or will it be said that under this statute one who is not a capitalist may, without criminality, assist capitalists in the doing of things which on their part are criminal? If that be so, then, if a capitalist and one who is not a capitalist join in doing things forbidden by this statute, neither can be punished, because one alone cannot be guilty of conspiracy. The persistent effort of the defendants, as the proof shows, was to force the railroad companies—the largest capitalists of the country—to coöperate, or at least to acquiesce, in a scheme to stop the use of Pullman sleepers; and for a time they had the agreement of a manager and other officers of one road to quit the use of the obnoxious cars, and perhaps a qualified submission of the officers of another road or two to the same dictation: Does the guilt or innocence of the defendants of the charge of conspiracy, under this statute, depend on the proof there may be of their success in drawing to the support of their design those who may be called capitalists, or does it depend upon the character of the design itself, and upon what has been done towards its accomplishment by themselves and by those in voluntary coöperation with them, from whatever employment or walk in life?

The Supreme Court of the United States, affirming the conviction of Debs, based its decision upon the broad powers of the Government to protect freedom of interstate commerce, saying:

> The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails.[3]

Not until 1922 did the organized railroad workers again attempt a general tie-up of interstate traffic. During the Shopcrafts' Strike of 1922, however, the management of the strike made a general appeal to all railroad workers to tie up traffic throughout the length and breadth of the land. Again the Government appealed to the courts and an injunction issued based upon the Sherman Act.[4]

It must not be assumed, however, that a concerted quitting of work on the part of employees of a railroad, unaccompanied by any concerted effort to obstruct the public duties of the railroad and the carriage of inter-

[2] *United States* v. *Workingmen's, etc., Council*, 54 Fed. 994 (1893).

[3] *In re Debs*, 158 U. S. 564.

[4] *United States* v. *Railway Employees Dept. of the A. F. of L.*, 290 Fed. 978.

state commerce, is unlawful merely because the concerted quitting may impede interstate commere. If such quitting was in furtherance of a lawful purpose—an immediate and legitimate object—toward the attainment of which the quitting has a proximate influence, the quitting is not unlawful. That has often been affirmed.

In 1921 the longshoremen and the truck drivers in New York City conspired to aid each other in unionizing their respective trades. The longshoremen refused to handle freight brought to the pier by non-union truckmen during the strike of truckmen to organize the trade, and the steamship company made no active resistance. This agreement tied up interstate and foreign commerce and both workers and steamship company were joined as parties defendant. An injunction was allowed.[5]

Workers, as well as trains and ships employed in interstate commerce, are agencies of such commerce and any combination to monopolize labor employed in interstate commerce is a restraint upon such interstate commerce. One Anderson, a seaman, brought an action against an association of shipowners (a trade union of employers), alleging that the shipowners maintained an employment agency and a fixed system for the employment of seamen which effectually excluded him and others from the practice of his trade until he had satisfied the requirements of the employment office, regardless of his qualifications as a seaman and the desire of captains to employ him. The lower court dismissed the action, but the Supreme Court held the action good, saying:

> If the restraint thus imposed had related to the carriage of goods in interstate and foreign commerce—that is to say, if each shipowner had precluded himself from making any contract of transportation directly with the shipper, and had put himself under an obligation to refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear. . . . A restraint of interstate commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable, in the absence of such restraint.[6]

By this decision it is clear that the Act affords protection equally to the sale and disposition of labor in interstate commerce and the sale and disposition of the products of labor.

THE BOYCOTT

In spite of the fact that the Sherman Act was passed in 1890, organized labor conducted, with more or less success, many interstate boycotts during the 1890's. It was not until 1902 that a private litigant turned to this Act for the protection of his interstate commerce against a trade union boycott. In 1902, the United Hatters, failing to compel the employees of the D. E. Loewe Company to join the union, and failing to induce Loewe to dismiss them unless they would join the United Hatters, this union appealed to the American Federation of Labor and, through its machinery, every union man in the country was exhorted to refuse to purchase any hat in any store where hats manufactured by D. E. Loewe were offered for sale. Wholesalers and retailers, waited on by union committees, were threatened with a boycott if they continued to buy such hats and many of them, therefore, discontinued their patronage.

This was a clear, direct assault upon the interstate commerce of Loewe. It was intended to inflict continuing injury until he should agree to carry on his business on the terms laid down by the United Hatters. Loewe appealed to the Federal Court for treble damages allowed by the Sherman Act and to the California Federal Court for an injunction, which he secured. The damage case was dismissed in the lower court on the ground that the Sherman Act did not apply to combinations of men who were not themselves engaged in commerce. The Supreme Court of the United States, however, held that "the Act made no distinction between classes." The Court said:

> If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and, at the other end, after the physical transportation ended, was immaterial.[7]

By the decision in this case, rendered in 1908, it was finally established that the Sherman Act afforded protection to interstate commerce at the hands of the Government by injunction or criminal prosecution against any combination that might interfere with it to the public prejudice, and that a private litigant might recover damages for interference with his commerce, regardless of who the interferers might be or their purpose in interfering. Thus, the application of the Act to labor combinations, as to all others interfering with the free flow of commerce, was definitely established.

The United Brotherhood of Carpenters in New York City conducted a boycott against the use of wood trim milled in non-union shops by refusing to erect it. In an action to enjoin this conspiracy under the Sherman Act, it was finally held by the Supreme Court of the United States that a private party was not entitled to an injunction. Relief by injunction was available only to the Government under the terms of the Act.[8]

PRIVATE PARTIES BENEFITED BY CLAYTON ACT

The Clayton Act, however, amending the Sherman Act in 1914, granted the right of injunctive relief to private litigants in interstate commerce cases. The Act also recognized the legitimacy of combinations of wage earners per se, and provided that in disputes between employers and employees, no court of the United States should enjoin certain acts when peacefully and otherwise lawfully committed. The organizations of labor interpreted the Clayton Act as legitimatizing the secondary boycott. The matter came to a test in a contest between the Duplex Printing Press Company and the International Association of Machinists. The machinists had unionized the shops of the principal manufacturers of printing presses except Duplex at Battle Creek, Michigan. They called a strike there and eleven out of some two hundred men responded to the strike call. The failure of the machinists' union to induce the machinists in the employ of the Duplex Company to respond to its call determined the machinists to compel the company and its employees to accept unionism under penalty of excommunication in the market place. Pursuant to this decision the union threatened strikes against exhibitors in the Grand Central Palace in New York City in preparation for an exhibition held by the manufacturers of printing presses unless the management of the exposition consented to exclude the exhibition of Duplex presses. Draymen refused to cart presses from the railroad yards to printing shops where presses had been ordered. It was announced

[5] *Buyer* v. *Guillan*, 271 Fed. 65 (1921).

[6] *Anderson* v. *Shipowners' Assn. of Pacific Coast*, 272 U. S. 359 (1926).

[7] *Loewe* v. *Lawlor*, 208 U. S. 274.

[8] *Paine Lumber Co., Ltd.*, v. *Neal*, 244 U. S. 459 (1917).

that the machinists would refuse to repair these presses and perhaps printing pressmen would refuse to operate them.

In the action brought to restrain this conspiracy,[9] it was urged by the defense that the prohibition of injunctions in cases between "employers and employees . . . in disputes involving terms and conditions of employment" when "peacefully" and "lawfully" conducted, forbade an injunction in the case of a secondary boycott. But the Supreme Court held that the Clayton Act, in restricting the use of injunctions between "employers and employees," did not authorize restraint of interstate trade. "Congress had in mind particular industrial controversies, not a general class war," said the Court; and again:

> It would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely sentimental or sympathetic, sense by the cause of dispute.

The effect of the Clayton Act was, thus, to leave undisturbed the Law as decided in the Danbury Hatters' case, except that the Clayton Act gave private parties remedy by injunction, in addition to the existing remedy at law for treble damages.

A refinement in the method of attacking the salability of a non-union product in interstate commerce with a view to escaping the penalties of the Sherman Act, was developed by the Journeymen Stonecutters' Association. Following the failure of that union to secure a renewal of contract relations with the limestone quarrymen at Bedford, Indiana, the union promulgated a rule, which it sought to enforce by the infliction of penalties upon its members, directing them to refuse to work upon stone which had been handled by men "working in opposition to this association." In practice, this meant that fabricated limestone coming from the Bedford quarries was not to be trimmed or worked upon by any journeyman stonecutter. The purpose obviously was to make it unusable to the building contractors who employed the journeymen stonecutters, with the result that the building industry would not buy Indiana limestone until such time as it had the approval of the union. The union contended strenuously that the Sherman Act could not be used to compel a man to work upon a product when it was distasteful to him to do so, and that mere refusal to work on material which had come to rest in any state was hardly an interference with the interstate commerce in that material. The Court had before it, however, evidence that the purpose was to stop interstate commerce between the points where the stone was shipped and where the stone was used. Evidence made clear that the journeyman stonecutter, if left to himself and satisfied with his own arrangements with his local contractor, did not care what the stone was or where it came from. If he quit work on Bedford limestone, he only did so because he was under threat of penalty enforced by the national union, whose president was engaged in going up and down the land to see to it that this stone should become worthless in the markets of the country. The Supreme Court directed the issuance of an order enjoining the officers of the union from the enforcement of their rule and restoring to the individual journeymen their natural right to work or refuse to work on Bedford limestone as they might please.[10]

These decisions of the Supreme Court of the United States have established the application of the Sherman Act to boycotts conducted by labor unions. Other cases, however, which show the activities of trade unions and the importance of the Sherman Act in keeping open the avenues of trade, are of interest.

There is the case of the Chicago carpenters who conspired with the contractors and unionized manufacturers of millwork to exclude non-union millwork from the Chicago market. It was agreed that if the contractors would employ only members of the Carpenters' Union, the carpenters would refuse to work on any wood trim which had been manufactured in non-union mills. The effect of this rule was to stop commerce in non-union millwork between the mills in Wisconsin and other states and Chicago. The combination was criminally prosecuted by the Government and a conviction was sustained by the Supreme Court.[11]

There is the combination among journeymen stonecutters in New York City who refused to work upon any cast stone, whether union or non-union, which was not made within a geographical area centering around New York City. The effort of the union was to secure all the work of casting stone for use in and around New York City to the union manufacturers of cast stone in that area. Thanks to the protection afforded by combination, these inside manufacturers took contracts for two or three times the amount charged by outside manufacturers. On the New Rochelle High School building, the lowest bid received outside of this area for the cast stone work was thirty-three thousand dollars less than the lowest bid from any bidder within the area. Yet the Building Trades Council of Westchester County called a strike on the High School in order to suppress the use of this stone, which would save the people of New Rochelle thirty-three thousand dollars. The successful bidder, a New Haven manufacturer and an employer of organized labor, finally enjoined the conspiracy and the building was completed with plaintiff's stone.[12]

The steamfitters and plumbers, endeavoring to compel the unionization of manufacturing shops where various types of furnaces and heaters were made, induced the Pittsburgh Building Trades Council to call strikes on buildings where non-union heating and ventilating apparatus made in Ohio was being installed. Had the combination succeeded in its efforts, the salability of the Ohio product in interstate commerce would have rested upon the pleasure of the organized steamfitters and plumbers. The combination was enjoined as a violation of the Sherman Act.[13]

Interference with Manufacture or Production

There remain to consider those cases upon which the attack is not directed against interstate transportation or against the distribution via interstate commerce of a particular product, but in which there is, nevertheless, an alleged material interference with interstate commerce as a result of unlawful interference with the activities of an employer.

The United Mine Workers prosecuted a strike against the Coronado Coal Company, substantially all of whose product was shipped in inter-

[9] *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443.

[10] *Bedford Cut Stone Co.* v. *Journeymen Stonecutters' Assn.*, 274 U. S. 37.

[11] *United States* v. *Brims*, 272 U. S. 549, 47 Sup. Ct. 169 (1926).

[12] *Decorative Stone Co.* v. *Building Trades Council of Westchester*, 23 Fed. (2nd) 426 (1928).

[13] *Columbus Heating and Ventilating Co.* v. *Pittsburgh Building Trades Council*, 17 Fed. (2nd) 806 (1927).

state commerce, by acts of violence and disorder. Beside mass picketing and assaults, the strikers resorted to dynamiting the company's tipples and firing upon its employees. These unlawful activities brought its production to a halt and interstate commerce in its product to a stop. The company alleged that by reason of the unlawful activities of the strikers, its interstate commerce was interfered with and that, therefore, the Act was violated. The Supreme Court held, however, that the disorder was a local strike for a local purpose and that the reduction of commerce resulting from the reduction of production was only an incidental and indirect restraint of commerce. There was, therefore, no violation of the Act.[14]

Again, where a manufacturer of leather goods, ninety percent of whose product was sold in interstate commerce, charging that former employees were maintaining a strike by mass picketing and acts of violence and disorder which alone prevented the operation of the factory and the continued shipment of the product in interstate commerce, sued to enjoin the strikers under the Sherman Act, the Court held that the interference with complainant's interstate commerce was incidental to the interference with his manufacture by persons having a direct interest in the terms upon which he carried on his manufacture and solely for the purpose of effecting those terms in their own behalf. The Court found no violation of the Act.[15] The Court in this case said:

> The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price, or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce.

Thus, the Supreme Court, by decisions favorable to organized labor, has entirely removed the ordinary industrial strike beyond the reach of the Sherman Act, even in cases where such strikes are maintained by force and violence.

On the other hand, where it appeared that the United Mine Workers were attempting by unlawful and violent acts to organize the entire field in West Virginia in order to protect union mined coal from competition by non-union coal, they were engaged in a conspiracy to restrain such commerce. The mines attacked produced more than forty million tons, ninety percent of which went into interstate commerce, and the purpose was not only to control the mines where the attacks took place, but to stop this flood of non-union coal from competing in interstate commerce with union mined coal. The Circuit Court of Appeals sustained the order granted in this case enjoining interference with the interstate commerce of the complainants, and the Supreme Court refused to review the case.[16]

ORGANIZED LABOR'S CRITICISM OF SHERMAN ACT

The attacks upon the Sherman Act and upon these decisions emanating from trade union headquarters have not suggested that trade union activities do not frequently restrain interstate commerce or are not intended to. They assert, however, that the Sherman Act was passed for the purpose of restraining capitalistic combinations and was not intended for, and should not be used against, combinations of labor. The arguments assume that the Court should have written into the Law something that is not there in order to grant a special privilege to organized labor, or that Congress should now either grant a special privilege for the benefit of organized labor or repeal the Law altogether. The reason for seeking special privilege is the desire to boycott. The cases here discussed answer the contention and afford ample justification for the Sherman Act. The public is not less injured by a restraint of trade at the hands of an organization of labor than at the hands of a capitalistic combination, and the public has no greater interest in allowing a labor combination to achieve its purpose by methods deemed injurious to the public welfare than a capitalistic combination.

From time to time, trade union propaganda has been laden with the charge that the Sherman Act is not really enforced against capitalist organizations but only against labor organizations. From figures available in the middle of 1928 on the prosecutions instituted under the Sherman Act by the Government, it appears that in the thirty-eight years of the life of the statute, the Government had instituted about 330 proceedings, of which 190 were civil and 140 were criminal. In 129 out of 305 completed cases, the Government received an order against one or more of the defendants for all or part of the relief demanded. Only seven of these orders were against trade unions, and in four out of these seven cases, the orders were granted to restrain the prosecution of strikes on railroads where the unions boasted that they would tie up the country's transportation until their demands were met. Out of the 305 completed cases, the Government secured seventy-three pleas or verdicts of guilty, or the defendants accepted imposition of fines on a plea of *nolo contendere*. Of these seventy-three more or less successful criminal prosecutions, twelve were against defendants, one or more of whom were trade unionists acting in support of a strike or trade union policy. Six out of these twelve cases arose out of the Shopcrafts' strike of 1922, when, as the record shows, the partisans of that strike resorted to dynamite and sabotage to prevent the operation of interstate trains. Out of forty-two petitions that failed for one reason or another, labor was interested in only one, and of sixty-one indictments which failed or were withdrawn, labor was interested in eleven. Thus, in a total of 305 cases under the Sherman Act, brought by the Government and completed by 1928, labor was interested in only thirty-one, about ten percent.

Of course, many of the cases most important to labor have been civil suits brought by private parties under the Act, but the proportion of these cases is small.

In the addresses of representatives of organized labor, in their publications and in their representations before committees of Congress, great stress has been laid upon the provisions of injunctions issued under the Sherman Act. It has been charged that these orders deny constitutional rights, freedom of speech and assembly, and it has repeatedly been charged that orders have compelled men to work against their will. No order of the courts has ever compelled a worker to work against his will. Such an order would be void and unconstitutional and of no

[14] *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344.

[15] *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457.

[16] *International Organization, United Mine Workers of America* v. *Red Jacket Consolidated Coal & Coke Co.*, and eleven other cases, 18 Fed. (2nd) 839 (1927).

effect. They have, however, in many cases, restrained the trade union's combining to quit work for some unlawful end and from imposing fines upon any of its members who did not refuse to work, and where the members of trade unions have been protected against the discipline of their own organizations they have voluntarily gone back to work against the wishes of the union. As to charges of interference with freedom of speech and assembly, it is well recognized that an order may restrain the commission of any act, however innocent in itself, which has been taken in pursuit of an unlawful purpose. Such restraints are most common in cases involving capital. The doctrine has been concisely stated by that distinguished liberal, Mr. Justice Holmes, as follows:

> No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.[17]

The Sherman Act is the expression of a broad principle of social and economic policy. Whether it is wise or not is a matter of judgment, which will be influenced in the case of each individual by his abstract political and economic notions, and perhaps by personal concern in the advancement of his own economic interests. The Law recognizes that a combination of wage earners is not in itself unlawful. Where men are not only allowed, but encouraged by the state, to combine their dollars under the leadership of a corporation to purchase labor, it must necessarily follow that men should be allowed to combine their labor under the leadership of a trade union to purchase dollars and the other considerations which enter the wage contract. But neither the investors, seeking advantage for the use of their dollars, nor the workers, seeking advantage for the use of their labor, should be allowed to prosecute their respective interests in disregard of the public welfare or by methods of compulsion and coercion to the injury of others and the general discouragement of enterprise. Industrial organizations and labor organizations may prosper and grow strong, but the basis of their strength in every case should rest upon the service which they are able to render, not only to their own members but to the public welfare.

[17] *Aikens* v. *Wisconsin*, 195 U. S. 194, 25 Sup. Ct. 3 (1904).

The Changing Economics of the Supreme Court

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OUR anti-trust legislation and the court decisions based thereon have been accused of thwarting economic development. At the same time, economic forces have had a profound effect on the law and its judicial interpretation. The relation between law and economics is reciprocal. Economic doctrines can be read into the Supreme Court decisions, but it would be precarious to claim that the Court has followed any theories consistently. Though it has certain predilections for logic, precedent and consistency, the Supreme Court is essentially pragmatic, making our government, after all, one of men rather than laws. Recently the Federal Supreme Court has well-nigh nullified the Sherman Anti-Trust Law recognizing the efficiency of combines and even monopolies.

The period before the Industrial Revolution has been described as one of undersupply and starvation, the nineteenth century as a period of oversupply and uncoördinated production, while in the twentieth century the limited markets and excess productive capacity are becoming pressing problems. Attempts are being made to coördinate supply and demand, to eliminate the ruthless competition between businesses, in short, to stabilize.[1]

Congress has recognized this trend by the exemptions from the anti-trust laws which it has given in whole or in part to banks, railroads, farmers, horticulture, foreign trade associations, and so forth. In fields not touched by this legislation the Supreme Court has by a process of inclusion and exclusion changed the original rigid interpretation of the Sherman Law so that today mergers, combines and perhaps even monopolies are permitted and welcomed. This reversal is due to the Court's knowledge and understanding of the efficiency in production and distribution of large scale organizations as well as their stabilizing effects. In the early history of the Sherman Law the Supreme Court was given to the *laissez faire* doctrine which, driven to its logical conclusion, assumed that the smaller the business units the more satisfactory the social result. Any combination, by eliminating some competition, was outside the public interest. This extreme individualism of the Court is partially explainable by the wording of the Sherman Law, namely, that every contract and combination in restraint of trade and every monopoly were to be illegal, even though before 1890 under the common law only unreasonable restraints were illegal or non-enforceable. But, as Justice Brandeis has said, "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence."[2] When the attorneys for the Missouri Freight Association claimed that the Sherman Law merely aimed to cover unreasonable restraints of trade, the Supreme Court replied:

> When . . . the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states . . . the plain and ordinary meaning of such language is

[1] Commons, John R., "Marx Today: Capitalism and Socialism," *Atlantic Monthly*, November, 1925.

[2] *Chicago Board of Trade* v. *U. S.*, 246 U. S. 231 (1917).

not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language and no exception or limitation can be added without placing in the act that which has been omitted by Congress.[3]

For nearly fifteen years the Court adhered to this decision. In the Shaunee Compress case it reiterated: "It has been decided that not only unreasonable but all direct restraints of trade are prohibited."[4]

LAW INAPPLICABLE TO CORPORATE CONSOLIDATIONS?

However, in spite of the sweeping construction of the Law the general view up to 1904 seems to have been that the Law could not reach corporate consolidations at all, since the right to acquire and hold property could not be limited by congressional enactment. The Knight case is the chief authority for this view. The American Sugar Refining Company, by acquiring the capital stock of four other companies, all located in Pennsylvania, obtained a ninety-eight percent control of the cane sugar business in the United States. The Supreme Court refused to dissolve the combine, saying:

> Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not primary issue; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it and effects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it.[5]

Again the Court said:

> Congress did not attempt thereby [passing the Sherman Law] to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property.

Yet the Knight case is no longer law and this is especially true when the Court considers labor cases. In the second Coronado Coal case the mines affected by the strike of the workers were all within a single state, yet the Supreme Court said:

> But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.[6]

The intent of the workers was not to prevent coal from being shipped in interstate commerce but to obtain higher wages through collective bargaining. If this decision were sound reasoning, then any attempt on the part of workers to obtain a national trade agreement or to unionize all the workers in an industry so as to put all competitors on an equality would be contrary to the Sherman Law.[7]

Ten years after the Knight case another one, which involved a corporate combination of competing businesses, came before the Court and its decision[8] dissolving the holding company seemed to be the reverse of the previous case. True, this case involved railroads which are clearly interstate in operation, but the lower courts as well as business men assumed that now all combines of previously existing competitors, with little or no regard to the proportion of the trade they embraced, were to be illegal. In fact, the Supreme Court in this case said

> that combinations even among private manufacturers or dealers whereby interstate . . . commerce is restrained are equally embraced by the Act.

Business men began to doubt their ability to carry on. A vigorous and almost universal protest ensued which was climaxed, perhaps, by President Roosevelt's special message to Congress, in which he said:

> In the modern world industrial combinations are absolutely necessary; they are necessary among business men, they are necessary among laboring men, they are becoming necessary among farmers.

Congress lent a deaf ear to the President's request. The Court adhered to its eighteenth century philosophy of individualism little realizing that modern industrialism had outgrown Blackstone.

ESTABLISHED CONCEPTION OF LAW REVERSED

The Standard Oil Company and the American Tobacco Company cases[9] mark the beginning of the Court's insight into current economic trends in this connection. By then the personnel of the Court had changed sufficiently so that all except Justice Harlan acquiesced in the direct and deliberate reversal of the established conception of the Sherman Law. Here it was stated that only undue or unreasonable restraints of trade were to be prohibited. The entire elimination of competition was still not to be tolerated. However, the two companies were found guilty of violating the Sherman Law as now modified and ordered dissolved into smaller competing units in a manner which the Court today probably would deem economically unsound. In fact, until the Steel Corporation case of 1920 it was generally thought that the corporate combination of a majority of the producers in any line might of itself constitute an Anti-Trust Law violation. Similar fates befell other concerns during the decade. Even the International Harvester Company, which had not followed the violent competitive practices of the Oil and Tobacco Companies, was separated in 1918 into numerous companies because of governmental and court proceedings.[10] This case seemed to prove that no one concern would be allowed to dominate any industry whether the success was due to fair means or foul. The Court, in this decision, emphasized that the International Harvester Company had not grown to its present position by internal efficiency, but by buying up competitors.

The dissolution decree was carried out as required, but the Government claimed more was needed to reintroduce competition. The Supreme Court in 1927 refused to grant additional relief, stating that the growth of the company as well as the development of a "full line" of farm implements "had led to cheap production and distribution."[11]

This was not the first time that the Court emphasized the advantages of large scale production, integration and mergers. The year 1918 might be called the beginning of this trend. In

[3] *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897).

[4] *Shaunee Compress Co.* v. *Anderson*, 209 U. S. 423 (1907).

[5] *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1 (1895).

[6] *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295 (1925).

[7] The plaintiffs were nine companies one of which, the Coronado, gives the case its name. The Supreme Court says of them: "The corporations were correlated in organization. . . . They had been operated for some years as a unit." Later in the case we are told that the owners closed down their mines with a view to opening them again on a non-union basis. Did this closing not also violate the Sherman Law? The Court lays itself open to accusations when it gives an ear to a plaintiff who has done the same deed for which he seeks redress from the defendant.

[8] *Northern Securities Co.* v. *U. S.*, 193 U. S. 197 (1904).

[9] *Standard Oil Co.* v. *U. S.*, 221 U. S. 1 (1911).

[10] *U. S.* v. *International Harvester Company*, 214 Fed. 987 (1914).

[11] *Ibid.*, 274 U. S. 693 (1927).

that year the Supreme Court sanctioned a complete monopoly. The United Shoe Machinery Company [12] had obtained control of the manufacture of 96.3 percent of the total volume of shoe machinery in lines in which it was subject to competition and in several lines it had complete control, that is, monopoly. The fact that the patrons of the company readily complied with the latter's restrictive policies seemed strongly to influence the Court to decide in favor of the company. The little ill-will that had been created among these customers seemed proof of the efficiency of the company's policies. Commenting upon the numerous acquisitions of competing plants and patents which had contributed to this extensive control, the Court declared:

> The acquisitions may be said to be justified by the exigencies or conveniences of the situation. . . . The company, indeed, has magnitude, but it is at once the result and cause of efficiency and the charge that it has been oppressively used is not sustained. Patrons are given the benefits of the improvements.

Giving weight to Werner Sombart's theory that under capitalism going concerns by their psychological and technological nature must grow or be submerged (to merely hold their own would be to recede), the Court said that

> the expansion [of the company] that has hence resulted has been as much in necessary evolution as by design. . . . It had to keep up with the mechanical march; to fall back would have been its destruction. . . . The idea is repellant that so complete an instrumentality [speaking of the assembled plants and machines] should be dismantled and its concentration and efficiency lost.[13]

[12] *U. S.* v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918).

[13] Although this case involved numerous patents it does not appear that the decision would have been otherwise in their absence. The Court also accepted the view (vehemently denied by the Government) that the company was composed in 1899 of non-competing companies essentially.

COURT'S ATTITUDE TOWARD MONOPOLY

The Court thus goes a long way towards the conception that even monopoly is no longer illegal under the anti-monopoly legislation of 1890. The true test of illegality is not the monopoly, but its result, although a price agreement among competitors is illegal even though the prices fixed are reasonable.[14] If the prices charged by a monopolist are above what the competitive prices would probably be, the public welfare suffers and such a monopoly would be illegal. It would be exaggerating to say that the Court's sanction of monopoly here is the accepted doctrine. Yet in the light of modern trends in business organization it might be safe to predict that the Court is definitely swinging in that direction.

In 1920 the Supreme Court again surprised many students of the problem in the Steel case.[15] The United States Steel Corporation had obtained about fifty percent control of the steel business, in some lines as much as one hundred percent. The Court refused to dissolve the company saying, "The law does not make mere size an offence, or the existence of unexerted power an offence." The Government had charged that uniformity of steel prices among the numerous producers was evidence of restraint. Yet the testimony of the corporation's officers, its competitors and even its customers that competition was not restrained was accepted by the Court as outweighing the Government's charge that the constancy of prices during certain periods evinced an artificial interference.

[14] *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392 (1926).

[15] *U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417 (1920).

Thus, the Court might be said to sanction stabilization of prices by means of "follow the leader" policy so evident here, in the oil business as well as elsewhere. Even though there is no active price competition there is competition in service and quality. Turning again to the question of efficiency the Court said:

> They [the lower court] underestimated the influence of the tendency to integration, the appreciation of the necessity or value of the continuity of manufacture from the ore to the finished product. And there was such a tendency, and although it cannot be asserted it had become a necessity, it had certainly become a facility of industrial progress. . . . We are unable to see that the public interest will be served by yielding to the contention of the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be serious detriment to, the foreign trade . . . and the public interest is of paramount regard.

Like a convalescing patient the Court sometimes has a relapse, giving evidence of a transitional stage. Thus, in the packers consent decree the defendants were forbidden for all time to engage in the wholesale distribution of certain lines of canned goods and groceries.[16] There seems no good reason for compelling a concern, even though it may have an unlawful monopoly in some line of industry, to forego its constitutional right to engage in other lines of industry. If the packers are able to handle the distribution of groceries more economically than are wholesale grocers, then it is in the interest of the community to have them do so. If not, then the "unseen hand" of competition may be relied upon to remove them from the field. The packers have realized that they consented to too much and requested to have the decree vacated, but without success. Recently the grocery chains have been putting in meat departments, and some of these are erecting their own slaughtering plants instead of buying the meats from the old packers. Consequently, if the packers are forced to comply with the decree there is a possibility that the ultimate insolvency of the strong packers of today will be laid at the door of the courts in driving such a hard bargain in 1921. It is not in the public interest to have one set of going concerns displaced by another set merely because a law or court decision stands in the way of the former.

[16] *Mergers and the Law.* National Industrial Conference Board.

Another economically unsound decision was the one rendered against the Eastman Kodak Company.[17] The company had refused to sell its products at the regular wholesale discount to a jobber who was operating a stock house in competition with one of Eastman's branches. It was the custom of the Eastman Company to refrain from selling at wholesale in any district where it had established its own branches.

The Supreme Court said:

> Although there was no direct evidence . . . that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference to warrant the submission of this fact to the jury . . . this determination is conclusive upon the question of fact.

Now the Court has often declared that a wholesaler may decline to deal

[17] *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927).

with a manufacturer for any or no reason. So why should the manufacturer be forced to deal with the wholesaler. Here the Court practically selects the customers for the Eastman Company. In other words, the Court, at least in this case, puts its stamp of disapproval on industrial and commercial integration.

If it is sound policy to sanction the unlimited growth of a manufacturing enterprise, so far as it is based upon efficiency in production and satisfaction to consumers, what makes it unsound policy to extend the same principle to the expansion of these enterprises on the distributive side?[18]

As previously noticed, the Court in numerous other cases pointed out the meritorious effects of integration.

COURT'S ATTITUDE TOWARD TRADE ASSOCIATIONS

After halting in several cases[19] involving the activities of trade associations the Supreme Court reversed itself (at least in the opinion of many economists and three of the justices themselves) and placed its stamp of approval on their activities. Trade associations are not mergers; the competitors in joining the association retain their identity and autonomy, giving up no legal rights of any competitive importance. They merely associate for the sake of research in connection with their common product and problems, and they gather information about purely trade matters, production technique, keeping of accounts, and the like. In some cases each member informs the central body of his prices, stocks and sales. Some actually fixed or tried to fix prices.

In the two later decisions, favorable to the associations, the Court makes it clear that the curtailment of production or the fixing of prices is still outside the Law, but many of the activities which were condemned tacitly or otherwise are here actually called meritorious functions. To quote from the Maple Flooring case:

It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of prices and trade practices. . . . Knowledge of the supplies of available merchandise tends to prevent overproduction and to avoid the economic disturbances produced by business crises resulting from overproduction.[20]

Again the Court said:

But the natural effect of the acquisition of wider and more scientific knowledge of business conditions on the minds of the individuals engaged in commerce and its consequent effect in stabilizing production and price can hardly be deemed a restraint of commerce, or if so, it cannot, we think, be said to be an unreasonable restraint or in any respect unlawful.

Thus, in the two latter trade association cases, in the refusal to order the International Harvester Company to further dissolve, in the United States Steel and United Shoe Machinery cases, the Federal Supreme Court has departed a long way from its early conception of the nature of free competition under the Sherman Law. Instead of espousing economic individualism the Court now endorses large scale production, integration and the elimination of the competitive wastes frequently pointed out by socialists and the more progressive economists. It also recognizes that trade associations and the larger business units have a wholesome stabilizing effect.

[18] *Mergers and the Law.* National Industrial Conference Board.

[19] *American Column and Lumber Co.* v. *U. S.*, 257 U. S. 377 (1921); *American Linseed Oil Co.* v. *U. S.*, 262 U. S. 371 (1923).

[20] *Maple Flooring Manufacturers Association* v. *U. S.*, 268 U. S. 563 (1925). A similar view was held in *Cement Manufacturers Protective Association* v. *U. S.*, 268 U. S. 588 (1925).

Anti-Trust Laws and Conservation of Minerals

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HAS the Sherman Act placed a premium upon the depletion of the mineral resources of the United States? Does the present policy of the Government bear any relationship to the America of the future? Are we dissipating the resources of our country at the expense of posterity? What part of the world's minerals are produced in the United States, and how does the exhaustion of resources in this country compare relatively with the production and exhaustion in other countries?

DISPROPORTIONATE INCREASES

Be it noted that the population of the United States has more than doubled since the passage of the Sherman Act, and, with the present rate of increase, we may expect a population of two hundred million by 1975, or a population of four hundred million a hundred years hence. Concomitant with this increase in population has come a disproportionate increase in the extraction of our mineral resources. Instead of doubling, as has the population, the value of mineral products has risen from six hundred and fifty million dollars in 1890 to approximately five and a half billion in 1928. The output of the four leading mineral industries—iron, bituminous coal, copper and petroleum—has increased ten-fold in value and six-fold in quantity since 1890.

For example, in 1927, our exports of petroleum and its products alone exceeded that of 1926 by seven million barrels. The story of the petroleum industry is familiar to all. Mr. Steele has ably surveyed the situation in this volume. The international problem was discussed by Mr. Marcosson, in *The Saturday Evening Post* for the week of October 26, 1929. However, the story of King Coal, Iron, Copper, Lead and Zinc is less well known. The following table, presented by Mr. Cornelius F. Kelley, President of the Anaconda Copper Mining Company, to the American Bar Association, at its meeting in 1928, shows the reader in concise form the production and per capita consumption of these basic minerals in 1927 as against 1890.

	Petroleum	
	Millions of barrels	Barrels per capita
1890	46	.73
1927	904	7.66
	Copper	
	Millions of pounds	Pounds per capita
1890	260	4.13
1927	1,660	14.07
	Zinc	
	Millions of pounds	Pounds per capita
1890	127	2.0
1927	1,227	10.4
	Coal	
	Millions of short tons	Tons per capita
1890	158	2.5
1927	600	5.1
	Lead	
	Millions of pounds	Pounds per capita
1890	285	4.5
1927	1,346	11.4

	Pig Iron	
	Millions of long tons	Tons per capita
1890	9.2	.15
1927	36.5	.31

Mr. Kelley has included in his consumption figures minerals extracted for export purposes. A true picture would deduct this in figuring per capita consumption. But this does not alter the situation, inasmuch as the minerals remain extracted and our total resources proportionately diminished, regardless of whether they are consumed in the United States or abroad. Extraction for export purposes merely aggravates the problem.

RESULT OF NUMEROUS FACTORS

The increase in per capita consumption, with a consequent increase in production, cannot be laid at the door of the anti-trust laws alone. It results from numerous factors and cannot be attributed to any one element to the exclusion of all others. It must be charged to several causes. New inventions, with resulting demands for improved machinery, have caused an increased demand for basic metals. This, in turn, has had its repercussions upon the fuel resources. Every agency of transportation renews demands upon the steel industry.

For example,

> Copper is an essential to all electrical manufacturers, to telephone and telegraph, light and power lines, to automobiles, refrigerators, ammunition and hundreds of articles of less important use or adornment which have become necessities of modern life.

The uses of petroleum are equally extensive, gasolene, kerosene and fuel oils ranking among its major products. Lead and zinc not only are used as base metals, but form extensive alloys, which enter into practically every agency that serves the necessities of modern life. Those who doubt the necessity of coal need only reflect upon the severities suffered in Pennsylvania during the anthracite strike of 1925–26.

Further enumeration is superfluous. The point here made is that our anti-trust laws play some part, however small, in this disproportionate per capita production and consumption of the basic minerals in 1930 as against 1890. For the purpose of emphasizing one of the factors which is pertinent to any revision of the anti-trust laws, let us set forth the relative position of the United States in regard to the extent of the known mineral deposits as contrasted with the rapidity of exhaustion in this country.

THE CASE OF PETROLEUM

Consider, first, the position of petroleum. No longer is its sole use that of a nostrum for all the ills of man. Today it is used chiefly for illumination and fuel. In truth, it has in part supplanted anthracite as a fuel. It is more easily transported, and contains greater calorific power. Witness the United States oil-fueled Navy, a sixty-two percent oil-burning Merchant Marine, in addition to the twenty-five million motor cars, making an annual demand of 536.9 gallons of gasolene per car.

At some future date, assuming a continued drain upon our oil beds and shales, we may have to give up petroleum and find substitutes. However, since such a shift must necessarily entail a reorganization of our industrial and social activities, with consequent costs, is it not good business and common sense to acknowledge the existence of the problem, approach it sanely and thereby postpone the operation of its effects?

The petroleum industry was of little importance prior to 1860. But today

petroleum and its products, apart from their immense direct economic importance may, in the automobile, the submarine and the airplane, and through numerous other applications, control strategically, from a nationalistic standpoint, the more inert foundations of civilization.

Perhaps the fight between the powers for the control of the oil reserves in the Near East and in Latin America is some evidence of the realization of this truism.

WORLD OIL RESERVES

Authorities do not agree upon the world's total remaining oil reserves. The American Petroleum Institute has been making a survey of the oil situation for several years, and in a recent study points to the incommensurate exhaustion of the resources of the United States as against those of other countries. One writer observes that although there is a considerable difference of opinion as to the total remaining reserves, all are agreed that the world resources are very small, considering the rapidly increasing rate of consumption; in other words, the petroleum age is merely a passing phenomenon as industrial epochs go.

Estimated world reserves are as follows:

Country	Barrels
United States	*8,000,000,000*
Russia	6,000,000,000
Persia and Mesopotamia	6,000,000,000
Northern South America	5,000,000,000
Mexico	4,500,000,000
Southern South America	3,500,000,000
East Indies	1,000,000,000
China	1,000,000,000
Japan	1,000,000,000
Roumania	1,000,000,000
Galicia	1,000,000,000

WORLD PRODUCTION

Examination of the above table shows that our reserves still exceed those of any other nation. But this fact loses some of its import when we note that our production, in 1926, reached 766,000,000 barrels, as against Japan's 1,900,000, and that we contributed 7,905,929,000 barrels of the world's total production of 12,392,541,000 barrels between 1857 and 1924. True, we may have exhausted only forty percent of the supply, but the remaining sixty percent, constituting 8,000,000,000 barrels, cannot last for many generations at the present annual consumption rate of 766,000,000 barrels. From 1857 to 1925, we contributed nearly sixty-five percent of the world's production. The exact figures are:

WORLD OIL PRODUCTION FROM 1857 TO 1925
(By countries)

Country	Barrels
United States	*7,905,929,000*
Russia	2,053,183,000
Mexico	1,194,991,000
Dutch East Indies	294,030,000
Roumania	207,842,000
Poland (Galicia)	190,633,000
Sudia	157,546,000
Persia	147,522,000
Peru	52,321,000
Japan and Tainan	49,496,000
Canada	25,561,000
Trinidad	23,264,000
Argentine	20,421,000
Venezuela	18,212,000
Germany	16,739,000
Savawak	16,505,000
Egypt	11,758,000
France	2,858,000
Colombia	1,192,000
Italy	1,186,000
Czechoslovakia	481,000
Algeria	70,000
England	12,000
All other countries	789,000
Total	12,392,541,000

UNITED STATES PRODUCTION PERCENTAGE

The exact percentage of world output contributed by the United

States, year by year since 1910, is as follows:

UNITED STATES AND WORLD CRUDE OIL PRODUCTION
(In thousands of barrels)

Year	World	United States	*United States Production in percent of total*
1890.....	76,633	45,824	*50.8*
1900.....	149,137	63,621	*42.7*
1910.....	327,763	209,557	*63.9*
1911.....	344,361	220,449	*64.0*
1912.....	352,443	222,935	*63.3*
1913.....	385,345	248,446	*64.5*
1914.....	407,544	265,763	*65.2*
1915.....	432,033	281,104	*65.1*
1916.....	457,500	300,767	*65.8*
1917.....	502,824	335,316	*66.7*
1918.....	503,430	355,928	*70.7*
1919.....	555,795	378,367	*68.1*
1920.....	688,804	442,929	*63.6*
1921.....	765,903	472,183	*61.6*
1922.....	858,909	557,531	*64.9*
1923.....	1,015,727	732,407	*71.9*
1924.....	1,014,160	713,940	*70.4*
1925.....	1,068,741	763,743	*71.5*
1926.....	1,095,934	770,874	*70.3*
1927.....	1,254,145	905,800	*72.2*

In 1890, we contributed 50.8 percent of the world's production; in 1927, this had risen to 72.2 percent. What evidence is there that a single barrel of this oil is replaceable?

Increased production in the United States has been largely due to increased petroleum fuelization and the rise of the motor car industry. From 1860 to 1890, it was demanded for illuminating and lubricating purposes, and then came to be used as a fuel. It is unnecessary to present a table of consumption by industries. Suffice it to say that a production of 26,200,000 barrels, in 1880, increased to 63,621,000 by 1900, mounted to 209,557,000 barrels in 1910 and reached over 900,500,000 barrels in 1928. Per capita consumption in the United States reached 6.17 barrels in 1925, as against 0.29 barrels in Europe. A country with a population more than four times as great as our own consumed only a fifth of the oil which we demanded.

One might gather from the above that this production has been in response to high prices prevailing in the oil-producing industry, but such is not the case. In recent years, few commodities have been subjected to greater fluctuations. This has been due, in part, to the discovery of new pools. With every discovery,

> the aim of each producer is to drain the largest possible underground area in the shortest length of time, before the oil is secured by a competitor.

The average price of the five best grades of crude oil dropped from $3.44 a barrel in 1920, to $1.04 a barrel in 1927. As a result of the competitive system, the oil producers have attempted to get together and limit production. But they can hardly limit production without at the same time restraining the interstate shipment of crude and refined oils, and thereby encountering the Sherman Act.

A REMEDY

Mr. Butler has shown how the proposed plan of the American Petroleum Institute was regarded by the Department of Justice. The Sherman Act enforces competition. It encourages the exhaustion of a particular pool by one producer, in order to prevent its drainage by competitors. Such a policy is to be condemned socially. The time has come when America must look to conservation, not depletion, to cooperation, not competition, if she expects to retain her present industrial position.

This was recognized by ex-President Coolidge. In addressing the Federal Oil Conservation Board, he declared that "the oil industry itself might be permitted to determine its own future," and that the future

> might be left to the simple working of the law of supply and demand, but for the patent fact that the oil industry's welfare is so intimately linked with the industrial prosperity and safety of the whole people, that government and business can well join forces to work out this problem of practical conservation.

However, since this Board is primarily concerned with reserves on public lands, since the Attorney General can lend no aid and since the states refuse to coöperate, it is difficult to see how relief can come save through the coöperation of the producers themselves, and this necessarily entails exemption under the Sherman Law.

THE CASE OF COAL

Perhaps the story of King Coal is not so well known. Here we find that world reserves are estimated at 7,397,553 millions of metric tons, of which North America contains approximately sixty-seven percent. The estimated coal reserves by continents are:

WORLD'S COAL RESERVES
(In millions of metric tons)

Continent	Anthracite	Bituminous	Subbituminous	Total in millions of metric tons
Europe	54,346	693,162	36,682	784,190
Asia	407,637	760,098	111,851	1,279,586
Africa	11,662	45,123	1,054	57,839
America	*22,542*	*2,271,080*	*2,811,906*	*5,105,528*
Oceania	659	133,481	36,270	170,410
Total	496,846	3,902,944	2,997,763	7,397,553

This is the estimate which was made by the International Geological Congress at the Toronto meeting in 1913. It included in this estimate reserves to a depth of six thousand feet, provided they were as much as two feet in thickness. It is doubtful whether it will ever be commercially profitable to exploit mines which are more than five thousand feet in depth.

Turning to coal production, we find that in 1926 the world output was 1,341,310,000 long tons, of which North America produced 607,660,000 tons. In other words, for 1926, the United States contributed approximately 45 percent of the world's coal supply.

World production by continents for 1913 and 1926 was as follows:

WORLD'S COAL PRODUCTION

Continent	Production in long tons	
	1913	1926
North America	*531,600,000*	*607,660,000*
South America	1,600,000	2,000,000
Europe	730,000,000	621,200,000
Asia	55,000,000	80,000,000
Africa	8,300,000	14,000,000
Oceania	15,000,000	16,450,000
Entire world	1,341,500,000	1,341,310,000

The United States and Europe together produce approximately ninety percent of the world's coal. The United States contributes about one-half of this output.

More specifically, we find that the coal production of the United States has increased as follows since 1890:

COAL PRODUCTION

Yearly Average	Quantity (in thousands of short tons)		
	Total	Anthracite	Bituminous
1886–1890.....	138,398	43,952	94,446
1891–1895.....	178,822	53,405	125,416
1896–1900.....	227,123	55,625	171,498
1901–1905.....	339,357	66,854	272,503
1906–1910.....	454,555	81,142	373,413
1911–1915.....	529,189	89,233	439,955
1916–1920.....	626,386	92,741	533,645
1921–1925.....	558,947	77,648	481,299
1926.....	657,804	84,437	573,367
1927.....	600,456	80,652	519,804
1928.....	569,355	76,600	492,755

From an examination of these tables, it does not appear that America's resources are in danger of immediate exhaustion. They exceed the coal resources of the whole British Empire. At our present rate of output, it is estimated that they will outlast all other countries, and will probably suffice for two thousand years.

Great Britain's supplies at the present rate of consumption will not suffice for more than six hundred years at most, and if we take into consideration the coal existing to a depth of four thousand feet . . . they will only last for four hundred and fifty years. Germany, before the ceding to Poland, after the World War, of a part of her Silesian coal field, and to France of her Saar and Lorraine fields, had resources of coal sufficient to last at the pre-War rate of output for one thousand years, but much of her remaining coal is lignite, which is of much lower calorific value than true coal. France will have to live on imported coal (or a substitute) much sooner than Great Britain or Belgium. The latter country has supplies sufficient for nearly five hundred years. Switzerland could mine all her resources in a few years.

OVERDEVELOPMENT

Because we have a supply which is good for two thousand years, the reader should not regard the problem as less acute. Here, it is not so much the duration of our ultimate reserves of coal that matters, but how long the better and more cheaply procured coals will last. It is a question of overdevelopment within the industry. It is a problem of waste. The net result has been dissatisfaction within the industry: lean earnings for investors, insecure employment for miners and a general feeling that neither the operators nor the miners give sufficient weight to "the public interest."

Mr. Gandy has discussed some of the trends in the bituminous field. Here the problem of overdevelopment is most serious. The United States Coal Commission, which was appointed by President Harding, says in its report:

> The fact of overdevelopment is stated most simply and commonly by saying that whereas the maximum annual demand for bituminous coal as measured by production was 579,000,000 tons in 1918, and for the five years 1917–1921, averaged 516,000,000 tons, the mines are equipped and manned to produce 700,000,000 tons at the lowest estimate, upward to more than 800,000,000 tons of bituminous coal per year.

Noting this observation in the Commission's report, one authority declares that

> many operators are on the ragged edge of insolvency much of the time, and only desist from closing out permanently in the hope and expectation that a strike or severe car shortage will bring a temporary flurry in prices by which they may recoup.

The Commission found that a limitation of marketing area by the adjustment of freight rates to express the true relation of cost to service, with a voluntary division of territory on economic lines, was only part of the solution. The consolidation of mining companies, grouping or pooling mining operations, it found also necessary and recommended that the Government should not only permit but actually encourage such consolidation, with a view to securing more steady production, less speculative prices, a wider use of long-term contracts with consumers, better living conditions, more regular employment and lower costs. The Commission pointed out that consolidation may be utilized to combine low and high cost mines, keeping the latter in reserve for periods of emergency and limiting to low cost mines current operation when the demand is normal.

The situation has not improved since President Harding's Administration. On every hand, there is evidence of overdevelopment, overproduction, waste and low prices, all resulting from the competitive system decreed by the Sherman Law. Is it not time for Congressional action on the Commission's report? Is it not time to modify our anti-trust laws in the interests of efficiency, economy and conservation? Wisdom seems to decry such a necessity. King Coal's plea is not based solely on the fear of the exhaustion of the better grades of the product. It is based upon the urge for efficiency within the industry, regular employment for the miners, profits for the investors and due regard for the protection of "the public interest."

THE CASE OF COPPER

Let us turn next to copper. Its position is unique. In former times it was consumed chiefly in the making of household appliances, ornamental wares and brass. As late as 1850, the total world production of fine copper totaled less than fifty-three thousand tons. But, by 1926, world output had risen to 1,619,789 short tons. This increase has been due, in a large measure, to the demands of our electrical era. Next to iron, it is the most important industrial metal, and industrial requirements are becoming more and more exacting. It is the second best conductor of electricity. It may be exposed to the weather without disintegration. The electrical industries in the United States now take fifty percent of our consumption. The wire, automobile, building, plumbing, railway and ammunition industries make heavy inroads on our production. The petroleum industry demands its oxide as a desulphurizing agent, while its sulphates enter into the preparation of germicides, insecticides, and so forth. It is impossible to predict the uses of the future.

When we turn to the world reserves of this mineral, we find that its position is more precarious than either that of coal or petroleum. We are less able to estimate accurately its reserve. The extent of the resources in China and Africa is unknown, but even if they go beyond present expectations their development must necessarily be retarded by inadequate transportation facilities. If we exhaust American reserves, and in 1925 the United States supplied fifty-four percent of the world output, it will jeopardize American industries, especially the water power and electrical industries. These are at present in their infancy.

The world production of copper has steadily increased since 1890. Typical years were:

WORLD PRODUCTION OF COPPER, 1891–1926

Year	Metric tons
1891.....	280,138
1901.....	529,508
1906.....	715,510
1911.....	879,751
1914.....	934,838
1917.....	1,438,291
1920.....	953,177
1921.....	556,594
1922.....	866,976
1923.....	1,245,720
1924.....	1,366,745
1925.....	1,434,716
1926.....	1,469,463

It will be noted that at the time of the World War the world's annual production of copper ranged around one million tons. Because of the trade depression production dropped following the Armistice. However, since 1921, it has swung upward. Production by countries has been as follows:

WORLD'S PRODUCTION BY COUNTRIES
(In metric tons)

Country	1921	1923	1925	1926
Africa	38,557	72,948	107,657	97,987
Australasia	18,932	18,139	12,318	10,200
Canada	20,532	36,496	51,020	58,173
Chile	59,239	182,384	189,503	202,319
Japan	54,092	63,790	65,692	65,570
Mexico	12,316	54,920	53,636	56,521
Peru	33,284	44,166	37,358	38,740
Spain-Portugal	33,200	51,815	58,000	58,000
U. S. A.	*229,331*	*650,912*	*774,749*	*789,082*
Other countries	57,111	70,150	84,783	92,871
Total	556,594	1,245,720	1,434,716	1,469,463
United States Production in percent of total	*41.2*	*52.2*	*54.*	*53.6*

In 1820 the mines of the United States could not supply home consumption, and imports were demanded. This condition had been checked by 1850, and since then the United States has been an exporter of copper. True, early consumption demands were small. In 1860, production totaled 7,200 tons. This rose to 27,000 tons by 1880, jumped to 115,000 tons in 1890, equalled 270,000 tons in 1900 and struck 837,000 tons in 1925—fifty-four percent of world production for that year.

The demands of future years promise to be proportionately exacting. The "re-orientation of industrial production on a basis of electrical power" has scarcely begun. It is estimated that world electrical development has reached only about one-fourth of its potentialities. The installation of larger generating and storage units, together with the creation of more extensive power zones, may reasonably be expected, with a consequent increase in the consumption of copper. The changes noted above have affected only a small percentage of the world's population. They are centered in a small area, and when the fruits of electrical progress are brought to the older and more densely settled parts there is some doubt whether production of copper can keep pace with consumption, unless great new sources are discovered. At any rate, the tax upon the resources will be much greater in the future than it has been in the past.

Hence, the urge for conservation.

THE CASE OF LEAD

The same is true of lead. The electrical industry is closely allied to its production. At present it absorbs between thirty-five and forty percent of the total lead output. Also, its physical and chemical properties are such that increased use must necessarily accompany developments of the chemical and building industries.

The United States did not occupy a prominent place in the production of lead until the beginning of the industrial era. It holds the most important place at the present time. The exact position of the United States in the lead industry may be gained from the following table, which gives the production of smelter of the countries with the largest output, together with the total for all countries.

WORLD PRODUCTION OF LEAD
(In metric tons)

Country	1913	1922	1924	1926
Australia	110,444	109,046	135,501	151,886
Germany	181,100	73,564	66,405	98,187
Mexico	62,000	120,821	161,207	200,381
Spain	198,829	119,200	137,114	147,392
United States	396,034	432,562	532,691	637,937
Total (all countries)	1,162,874	1,077,640	1,330,841	1,602,773

When we consider that an industrialized Europe meets one-half of her needs with imports from the United States and Australia, that the output of the United States has increased disproportionately with that of other countries since 1890 and that in 1928 we supplied approximately forty percent of the world's production, the problem of "coöperation for conservation," with its consequent amendment of the Sherman Act, assumes added importance, as applied to the lead industry.

THE CASE OF IRON ORE

Turning finally to the iron ore situation we find that here, too, the United States has produced more than her fair share of the product.

Estimates of world reserves vary, but in 1910 the International Geological Congress placed the reserves which could be profitably exploited at one thousand million tons, while the potential reserves were placed at four hundred and twenty-four billion tons. One optimistic writer declared, in 1929:

> It may appear that certain regions . . . may be exhausted in the future. However, there is little to fear but that other deposits . . . will supply the gap. Conservative estimates by economic geologists indicate that there are now about thirty billion tons of ore in reserve, which at the present annual consumption, of a hundred to a hundred and twenty-five million tons, should last two hundred years. Of this huge tonnage, two-thirds is located in the Western Hemisphere; Brazil and the United States possess most of this, but Newfoundland and Cuba both have notable deposits; France has half the balance and the rest is scattered about in readily accessible locations.

The writer does not agree that "the mind of man will always find means to win from Mother Earth this most useful metal": conservation is essential.

Turning to the production phase of the picture, the exact place of the United States may be gained from the table on the following page.

An examination of this table shows that the United States has, since 1890, contributed between thirty-four and forty-two percent of the total world output of pig iron, a percentage all too large, in view of the fact that only half the remaining reserves are located in the Western Hemisphere

WORLD PRODUCTION OF PIG IRON, 1890–1927
By decades, 1890–1920; by years, 1921–1927 (in millions of tons)

Year	Great Britain	United States	Germany and Saar		France*	Belgium	Luxemburg	All other countries†	Total	*United States Production in percent of total*
1890	7.90	9.20	4.03		1.93	0.77	0.55	2.37	26.75	*34.4*
1900	8.96	13.79	7.43		2.67	1.00	0.96	5.00	39.81	*34.6*
1910	10.01	27.30	12.89		3.97	1.82	1.66	7.11	64.76	*42.2*
1913	10.26	30.97	16.49		15.12	2.45	2.51	10.10	77.90	*39.8*
1920	8.03	36.93	6.93	0.88	3.38	1.10	0.68	4.92	62.85	*58.7*
1921	2.62	16.69	7.72	1.13	3.31	0.86	0.95	4.40	37.68	*44.3*
1922	4.90	27.22	9.25	1.14	5.14	1.59	1.65	3.89	54.78	*49.6*
1923	7.44	40.36	4.86	1.00	5.34	2.11	1.38	6.42	68.91	*58.5*
1924	7.31	31.41	7.68	1.37	7.57	2.80	2.12	6.94	67.20	*46.8*
1925	6.26	36.70	10.01	1.43	8.36	2.50	2.33	8.33	75.92	*48.4*
1926	2.46	39.37	9.50	1.61	9.28	3.35	2.52	9.61	77.70	*50.6*
1927	7.29	36.57	12.90	1.74	9.15	3.69	2.69	11.24	85.27	*42.8*

* Since 1920, Lorraine is included with France.

† Includes Russia, Poland, Norway, Sweden, Italy, Austria, Hungary, Czechoslovakia, Spain, Canada, Australia, India, Japan and China.

and that even this is divided between the United States and Brazil.

"COÖPERATION FOR CONSERVATION"

By this time the reader must have queried, what relationship does all this bear to anti-trust legislation? What is the connection between the production and the reserves of oil, coal and iron and the Sherman Act? The answer is simply this: History teaches that the supremacy of a nation's industry is intimately linked with the mineral resources at the disposal of that power. More particularly, the recent industrial transcendence of our country has been made possible largely because of our superabundant mineral reserves. If these minerals, oil, coal, iron, and so forth, constitute the basis of our present supremacy, are they not likewise essential to continued prosperity and supremacy?

Now if these two postulates are sound, and the writer so regards them, then it is highly important that the producers in these basic industries eliminate waste and foster conservation. The leaders in these industries are conscious of this, and some steps looking to this end have been taken. In truth, one of the present tendencies throughout all industry is self-regulation. Rapid strides have been made in certain industries in imposing higher standards upon their members. But the basic mineral industries cannot, under the present law, limit production regardless of how beneficial, necessary or reasonable such limitation may be, if, by so doing, they *ipso facto* restrain commerce among the several states. The second Coronado Coal and the Trenton Potteries cases definitely establish this principle. Obviously, when the oil, coal and pig iron deposits are distributed throughout different sections of the Union, producers of such minerals, by limiting output, must prorate the contributions of these areas and thus necessarily entail a violation of the Sherman Act.

Such is the embarrassing position of the producers of mineral products under the present law.

The primary purpose of a government is to balance conflicting interests and promote the general welfare of its people—the welfare of posterity equally as much as the welfare of the present. Should not a law which appears to be adverse to that welfare be changed either by judicial interpretation or statutory enactment so that it best conserves the public interest? It appears so. In view of the profound respect for the doctrine of *stare decisis*, entertained by the present Supreme Court, a change by interpretation can hardly be expected. Other departments of the Government must act in order to secure the most efficient use of our mineral reserves. It appears that the public should demand of Congress the exemption of basic industries other than agriculture. If properly regulated or supervised, this should promote rather than retard the public interest. Certainly *collective coöperation for conservation* is a factor of vital importance in any revision of the anti-trust laws of the United States. Otherwise, we shall find our mineral resources prematurely exhausted.

The Anti-Trust Laws and the Oil Industry

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CHAOS has laid hold of the petroleum industry many times since the beginning of its history in this country. This has been caused by the fact that usually there has existed either an oversupply or a shortage of oil, a problem of how to care for the gushers or a mad search to locate new sources of supply. A discovery has always led to a wild scramble and a life and death race to reach the oil sand and capture the black liquid that has revolutionized so many other industries. The migratory nature of petroleum and the uncertainty in locating new fields are the two principal factors which have contributed to such chaotic conditions.

The class of men who pioneered this industry were for the most part hardy, adventurous and extremely individualistic. The very elements which had to be contended with made it a game in which the weak could not survive. Because the industry was unorganized there were no precedents to govern, nor were there any standards of ethics.

Early Attempts at Coöperation and Conservation

In 1870 John D. Rockefeller had become one of the principal figures in the petroleum industry. He hated the intense competition existing at that time because he regarded it as "idiotic, senseless destruction." He looked on "coöperation and conservation" as the ideal to be attained in the operation and the development of this new and important industry which was beginning to expand in this country. Mr. Rockefeller may have had the proper conception of the ideal to be attained, but his plans for realizing it resulted in opposition that has left its mark on the industry to this day in the way of legislation and court decisions.

"Coöperation and conservation" at that time meant the elimination of competition and the bringing together of all the units of the industry into one group under one leadership. In short, it meant the creation of a monopoly. Competition was considered the underlying principle of trade and commerce by economists and legislators, so any attempts to gain a monopoly were viewed with suspicion.

Men who had taken the lead in this new industry indulged in unethical practices which have never been justified. The railroads which were being extended into every state had become the principal means of transportation. Alliances were made between the railroad companies and the most powerful men in the oil industry. Rebates and drawbacks were secured from the railroads and the many other pernicious practices indulged in made oil the target for legislation and court action for years.

At that time new methods of business organization were beginning to be employed. Business corporations were organized to take over the individual or partnership form of business. Larger aggregations of capital were brought together in business enterprises. It was the oil industry and the railroads that led the way.

In the attempt to monopolize the industry, corporations executed trust agreements for the purpose of bringing

all the units of the industry under one control. This plan, being followed by other lines of business, gave the word "trust" a new meaning; that is, "a gigantic business organization in the form of monopoly."

The next step in the evolution of business organization was the holding company. Whether the steps taken were a logical evolution growing out of conditions that were developing or whether it was an attempt to create a monopoly for the exploitation of the public, the movement was viewed with alarm by the general public. Attacks were made in the state courts under the common law. State legislation was enacted supplementing the common law. Then national legislation was enacted, and finally the highest court placed its interpretation upon the various legislative acts, state and national. So out of it all was evolved "The Rule of Reason, Direct and Indirect Restraint." The limits of the law have never been defined sufficiently clearly so that one can tell whether it is being violated as new conditions arise.

The petroleum industry originated many innovations in the conduct of business and plans of organization, which were adopted by other lines of business. Much legislation and many court decisions that followed were inspired by oil. The Federal Government and the states, with but few exceptions, were committed to the policy of enforcing anti-trust legislation. Therefore, competition was enforced in the oil industry. Particularly in the production of oil, there has been an era of too much drilling which has shown competition at its worst.

Conditions During World War

During the World War the demands for petroleum were constantly increasing. Yet production did not get ahead of the expanding needs and uses because the drafting of men into the army tended to restrict development. Prices went to higher levels. It was found necessary to conserve the use of fuel under a fuel administrator. Conservation at this time did not include restrictions in drilling but in the uses of petroleum. There was probably a nearer approach to the bringing of all units under one leadership than at any other time in the history of petroleum. There was but little trouble in getting those who were engaged in the oil industry to fall in line and follow the suggestions and rules promulgated by the fuel administrator. Here was an intelligent leadership in which conservation was practiced. The oil industry profited and the public was not the victim of profiteers. No doubt, under other conditions and in other times the Government could have found evidence of violations of the anti-trust laws, but in a crisis such as the World War every industry had to be unified. Any other plan would have caused a break-down in governmental affairs. If this could be done during a great national crisis, why could not some plan be devised in peace time that would give the general public such advantages?

Following the World War many new aspects entered the oil industry. Due to sub-surface geology, the seismograph and other geophysical instruments, greater precision and skill have been employed in locating new fields. The discovery of a new source is not accompanied with the risk of older days. Another factor is that the processes in manufacture have been greatly improved. Finally, the major companies have realized the need of entering foreign countries for a new source of supply. These factors have caused an overproduction in oil, notwithstanding the increased demands for gasoline and other refined products.

DRASTIC REMEDIES NEEDED

Millions of barrels of oil are being brought to the surface daily. There are nearly three million barrels produced in the United States each day. Petroleum is irreplaceable and should be carefully conserved for the uses to which it is best adapted. Yet it is now permitted to compete with cheaper fuels. In addition, the expense of storing petroleum above the ground must eventually be borne by the consuming public. Tankage, insurance and evaporation make overproduction an expensive project.

Old wells which have a settled production cannot be made to produce in competition with flush production. It is estimated that there is only about a thirty percent recovery. When a well is abandoned the oil left in the ground may be lost forever.

The very laws which were passed a few years ago to control the oil industry are now considered by many as the chief obstacles in the way of a sound conservation policy. Many who are familiar with the oil situation maintain that waste and overproduction can best be controlled by voluntary agreements between the operators for shutting down in periods of overproduction, and that greater recoveries can be had by agreements for unit development of areas. Yet the very thing that needs to be done cannot be done without violating the law.

CAN THE OIL INDUSTRY BE CONTROLLED?

On account of the nature of the petroleum industry, it is hard to promulgate a permanent policy. Today we are seeking a solution for the evils of an oversupply of oil. Tomorrow we may be making an intensive search for oil and more oil.

Foreign operations are not subject to our state and national laws, but much of the complaint at present is due to the oil that is being produced abroad. Russia is known to be potentially a great oil country. Moreover, it is hard to determine what factor she will be in unloading oil on the markets of the world.

It has been the policy of the National Government and the respective state governments to enforce competition. Conservation is largely a question of state legislation, yet it will be difficult to secure proper state legislation. The National Government can do but little by itself to solve the problems of overproduction.

The ownership of oil is divided into so many units that it is difficult to get uniformity of action. It has been the policy of the law to enforce development and the royalty owners as a rule demand it. Practically every one is opposed to the Government's entering into the industry either by ownership or control.

On the other hand, there are many small operators, together with a large part of the general public, who strenuously oppose a change or repeal of the anti-trust laws or the enactment of legislation that would tend to unify all the units of production and merge them into one great monopoly. This is about the only other alternative, aside from governmental control, if there is a change from the present situation. Besides, many believe and insist that there is no need for alarm, for the reason that new substitutes will be found by the time the present supply is exhausted. However, no substitutes have yet been discovered that begin to approximate petroleum.

Will the petroleum industry go the same way as the lumber industry—continue a ruthless campaign of drilling until all deposits have been depleted as have the magnificent forests? New forests can be grown over a long period of time, but oil cannot be replaced.

SOME PROPOSED REMEDIES

It has been proposed that there should be a tariff on imported crude oil. It is contended that such a step would be an aid in the securing of a sound conservation policy. There are over 330,000 oil wells in the United States, 250,000 of these wells averaging less than one barrel per day. These wells cannot compete with imported crude oil. Another argument for a tariff is that lumber, steel and all other materials used in the petroleum industry are on the protected list, so that the oil industry does not get its fair return because it is compelled to compete with low grade crude oils that are imported free, when it is necessary to buy all materials on a market that is protected by a tariff.

A second proposal is to secure international agreements between oil producers restricting their production in foreign countries based on consumption of previous years. By securing such agreements the flush production can be controlled both in foreign fields and in the United States, so that importations would not hurt settled production in this country. If such agreements should need further legal sanction, some provision similar to the Webb Export Act could be provided.

Another proposal is the enactment of state legislation that will have for its purpose the conservation of petroleum and the limiting of flush production in periods of overproduction. State trust legislation needs to be amended so as to permit voluntary agreements and coöperation among producers during such periods; also to provide for compulsory limiting of production in single pools during such times when minority operators refuse to coöperate.

A compact between the oil producing states has also been proposed for the purpose of conserving petroleum. Two plans have been discussed. First, a compact setting up an interstate conservation commission which would have the power to declare periods of overproduction. During such periods producers in the districts affected would have the right to restrain production, the compact by its terms relieving them from the operation of the state anti-trust laws. The consent of Congress, to be secured to the compact, should be so drafted that agreements of this character would be immune from Federal anti-trust laws. Second, the vesting of such interstate commission with coercive powers authorizing such commission to establish regulations for the prevention of waste.

The United States Government has taken a step toward conservation. President Hoover issued a statement shortly after he became President:

> There will be no leases or disposal of Government oil lands no matter in what category they may lie, of Government holdings or Government controls, except those made mandatory by Congress. In other words, there will be complete conservation of Government oil in this Administration.

This new policy means that millions of acres of land in the Rocky Mountain states will be withheld from the prospecting and the development of oil at least for the next four years.

A further proposal has been to enact legislation which relieves the oil industry from the anti-trust laws, both state and national, because these laws were passed at a time when conditions were entirely different from those which exist today and because those who are in the industry must be permitted to make agreements to eliminate waste and to control the producing of petroleum, if a solution is to be had.

WILL THESE REMEDIES SUFFICE?

The problems of the petroleum industry are international, national and local, and cannot be solved by a tariff on crude oil imported into this country. On account of the many uses for petroleum in this country and on account of its being a diminishing product, every step should be taken to import all that can be secured and hold our own supply in reserve as much as possible. No substitute has appeared on the horizon that can take its place so cheaply. The future welfare of the country cannot be hazarded by such a risk as exhausting our petroleum deposits completely.

A tariff on petroleum is not a conservation measure. Settled production would not be benefited by it, as it would be an incentive to hasten the development of our other fields and thus secure more flush production in this country. The United States is actually producing seventy percent of the oil that is produced in the world and is consuming more than it is producing. If a tariff were placed on oil, the crude oil that is being imported would be refined outside of the United States, with the result that the exportation market which this country enjoys would be seriously injured.

Is it an argument that industry must buy its materials on a market protected by a tariff? Would it not be better to seek a lower tariff on such materials? A sound conservation policy will permit the importation of crude oil as long as it will accrue to the benefit of the consumers. Such a policy tends to restrict development in this country.

Voluntary international agreements between the various major producers can be relied on as an effective method of controlling the production outside of this country. The United States is the largest user of oil and is also the largest producer of oil. Therefore, it is one of the best markets in the world. Importers will not invite the enactment of tariff legislation by continually flooding this country with crude oil which demoralizes our local markets. Such international agreements should take into consideration the relation of consuming areas to the respective centers of production so as to cut down uneconomic transportation, and should provide for cutting down production in foreign fields to meet such demands based on the amount consumed the previous year.

No policy of conservation can be effective without state legislation and administration. Practically every state has passed some type of anti-trust legislation and every state has the right to conserve its resources and prevent waste. Oklahoma, Texas and California, the three greatest oil states, have already passed legislation to prevent waste and to curb overproduction within their borders. The steps so taken have not led to any conflict between the state and the National Governments in enforcing such legislation. State legislation should be passed and present laws clarified so that operators would be permitted to combine for orderly and economic production.

It is urged that a compact can be made about anything. Each state can do everything without a compact that it could do under a compact. Different states have different problems and a uniform compact would not be feasible. Besides, conditions in the oil industry change so rapidly that by the time a compact was secured new conditions might demand some other remedy. Compacts heretofore adopted have had to do with boundary lines or some condition that was not subject to such rapid changes as takes place in the oil industry. A compact which would delegate legislative authority would probably be declared unconstitutional. A compact that would provide for voluntary agreements only would be ineffective.

The National Government is aiding conservation by restricting the development of the public lands at this time. The potential areas of oil deposits are cut down. The effect of such a step will not be felt immediately, but when flush production declines, if no new fields are opened in this territory, a long step will have been taken to cure the evils of overproduction in the future.

The Government has gone one step further. In California it has caused wells to be shut down that have been drilled into the oil sand and found to be producers. Also, the Department of the Interior is securing agreements between the lessees for coöperative development so that various pools can be operated as a unit.

CONCLUSION

If one department of the Government can see the value of shutting in wells and providing a plan for coöperative development, other departments should be willing to modify the trust laws to permit agreements and plans of development on privately owned lands.

National anti-trust laws have been construed to determine whether the effect of various kinds of agreements created combinations in restraint of trade. New conditions have arisen and much uncertainty exists as to how existing laws may affect agreements made in the interest of conservation. When it is determined that agreements are not in restraint of trade and are not combinations, and when it is further determined that there is waste and overproduction and that such conduct is uneconomical, could not a new "rule of reason" be promulgated and such circumstances be construed as not coming within the purview of the anti-trust laws? If not, national legislation should be enacted, specifically declaring such circumstances as not coming within the purview of the Sherman Act.

An amendment should be made to the national anti-trust laws which would permit voluntary agreements for unit or coöperative development. Also, state-wide or nation-wide agreements should be permitted between producers to restrict drilling or to restrain production during periods of state-wide or nation-wide overproduction, to be found and declared by a Federal agency to be created.

This legislation is needed more as a practical rather than as a legal remedy, for it is conceded by most legal authorities that, with but few exceptions, agreements among operators for unit or coöperative development of a single pool do not violate either Federal or state anti-trust laws. State-wide agreements for restraint on production within the state would probably violate state anti-trust laws, but not the Sherman Anti-Trust Act. Agreements among the operators in several states to restrain production might be a violation of the Federal anti-trust laws.

The petroleum industry has grown up and has learned its lesson. What is right and what is wrong is easily determined. There are but two ways open. Let the industry govern itself, or place it under governmental regulation.

Initiative should not be curtailed. This will surely follow if it is placed under too strict governmental control. One of the greatest figures in the oil industry in the world today recently said: "The petroleum industry has learned its responsibility to the public. Its members must get together to promote its welfare."

Some Trends in the Bituminous Coal Industry

By Harry L. Gandy
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IF the word "trust" is to be understood in its popular sense as denoting a combination of otherwise independent producers, with sufficient economic power to control the output of the product to the extent of regulating prices, then there is no such movement in the bituminous coal mining industry. The explanation of this fact is to be found in the conditions under which the industry is carried on. It is essentially an industry of small units.

A Competitive Industry

The largest individual operating company in the bituminous mining industry produces less than five percent of the total annual output of the country. With an annual production in the neighborhood of 525,000,000 tons, and a total of 6,450 mines operating in 1928, there were less than 100 companies that produced as much as a million tons apiece. There were only about 150 companies that produced as much as 500,000 tons each. At the other end of the list there were 2,752 of the 6,450 mines, each of which produced less than 10,000 tons annually. The large number of small competing units creates a situation in which any such concerted action as would be involved in a real trust movement is impossible of realization.

What is true of the country as a whole is almost equally true of the individual producing fields. In every field, even though there may be one or two large units of production, there is a much larger number of medium and small sized operations. Under such circumstances, it would be extremely difficult, if not impossible, to establish trust control over production and price in any single producing field. At any rate, no such undertaking has as yet been successfully carried out.

The mining of bituminous coal may well be cited as a typical competitive industry. With its large number of independent competing units, it illustrates in its activities all the advantages and disadvantages of unrestricted competition. For reasons to be hereinafter developed, that competition is extremely active, and results in a prevailing price, which does not yield a reasonable return to the capital invested. No industry is more in need of the stabilizing effect of trust control, but in no place other than in agriculture is the establishment of such control more nearly impossible.

If the tendency to cut-throat competition among bituminous coal operators is to be eliminated and production and prices are to be stabilized, it must be by some other means than through the establishment of trusts, and that without regard to the legal difficulties in the way of such combinations. Conditions in bituminous coal mining are improving, as a result partly of the working out of economic forces and partly of self-regulation within the industry. For the benefit of those who are prone to bring charges of incompetency against the industry, it may be worth while to point out a few of the main difficulties with which it has to contend—difficulties which, in my opinion, do not exist to the same degree in any other line.

Seasonal Demand

The fundamental difficulty to be overcome is the seasonal character of the demand for coal. According to the estimate of the Bureau of Mines, the actual rate of consumption of bituminous coal in January is more than fifty percent greater than the rate of consumption in July. The activity of bituminous mining takes on a seasonal character, not because of any characteristic of the industry itself—such as affects, for example, the canning of fruits and vegetables—but entirely as a result of seasonal fluctuation in the use of its product. Over this fluctuating consumer's demand, practically no control can be established.

Impossibility of Storage

The second obstacle arises from the difficulty of storing coal at the mine. Other industries faced with a seasonal demand for their products, such as cement manufacturing, can at least partially offset the lack of orders in slack seasons by producing and adding to stocks in their own hands. In the mining of bituminous coal, such an equalizing practice can be utilized only to a trifling extent. Mining of coal for storage at the mine is practically unknown. Physical conditions surrounding the mines, at least in the mountainous Appalachian region of the East, are such as to afford no opportunity for the building up of stock piles. Furthermore, the commodity is so bulky that sufficiently large storage at the mines, to have an appreciable effect in equalizing production, would require a large area. The storage of coal would involve some breaking down of sizes, and the rehandling of the coal would cause additional degradation. Finally, the added expense of rehandling would often make the relatively lower grade stored coal more costly than the superior freshly mined coal. Producers' stocks cannot be utilized as a method of equalizing bituminous production.

So far as there is any storage of coal during periods of low consumption to offset the demand in months of maximum consumption, that service is performed either by middlemen or by consumers. Storage by middlemen is confined almost entirely to stocks of domestic fuel in the hands of retail dealers and to stocks accumulated at the head of the Great Lakes by the dock companies for winter distribution. The larger part of the coal accumulated in stock piles is in the hands of actual consumers—the railroads, public utilities, industrial plants, and so forth. It is these accumulations that are covered by the quarterly stock reports of the Bureau of Mines. How far these middlemen and consumers will go in putting coal into stocks in the months of low consumption, is a matter that they determine for themselves. Over the amount going into or out of stocks, the mine operator has practically no influence.

The two difficulties already described, namely, seasonal demand and inability to stock, are responsible for the fundamental difficulty with which the bituminous mining industry has to contend. As it can mine coal only when it has a customer to whom to send it, and as those customers cannot be compelled to stock coal in summer months in sufficient quantities to stabilize production, coal mine operation is bound to fluctuate with the season, and the mine capacity necessary to meet the maximum winter demand will unavoidably be far in excess of the amount actually used during the summer months. Operation with a substantial amount of unused capacity during a considerable portion of the year must necessarily exist.

UNUSED CAPACITY

Besides this seasonal fluctuation in demand, the industry must contend with another fluctuation. Bituminous coal is primarily an industrial fuel. The demand for industrial fuel naturally changes with varying degrees of activity of our industrial plants and transportation systems. Years of relatively light consumption usually follow years of enlarged consumption. The inability of the industry to meet any possible demand for its product, whether for domestic heating or for driving the wheels of industry, would be nothing less than a disaster. Consequently, it must be equipped to meet any maximum demand that may be put upon it. In one week of 1926 it was called upon to produce coal at the rate of seven hundred and thirty million tons a year. The capacity to produce that amount, therefore, is necessary, if sufficient coal is to be mined in time to meet emergency demand. From the social point of view, only so much of the bituminous mining capacity of the country as exceeds this amount can be regarded as excess capacity.

As a result of these seasonal and industrial variations, the industry finds itself obliged to operate with a necessary emergency capacity of seven hundred and thirty million tons a year, with an average annual demand, as shown by the records of the last five years, of five hundred and twenty-five million tons a year, with a normal winter demand at the rate of six hundred million tons a year and a normal midsummer demand sometimes dropping to a four hundred million ton yearly rate. In other words, for a large part of the time the industry is weighted down by an unused capacity, the natural effect of which is to intensify competition and force down prices.

The depressing effect upon prices of this unused capacity is accentuated because of three relatively minor features of the industry. In the first place, the demand for bituminous coal is extremely inelastic. A consumer, whether domestic or industrial, needs, and must have, a certain amount of coal and, generally speaking, does not need and does not want additional amounts. An apartment house owner, or an automobile manufacturer, does not buy more coal because the price is low, or less coal because the price is high. A reduction in price does not stimulate sales and, conversely, a small excess of coal in the market tends to depress prices greatly. For that reason, an operator who seeks business by the method of lower prices can usually obtain it only at the expense of some other operator who would otherwise be supplying that buyer. This almost rigid market demand denies to the coal operator the advantage that comes to most producers of other commodities through stimulating consumption.

In the second place, while it is customary to speak of bituminous coal as a single and simple commodity, the fact is that there are many varieties suited to different uses. Let us consider the matter of size only. For household use, demand is largely for lump coal, while for use in automatic stokers fine coal may be desired. At different seasons the demand tends to center on different sizes. When a mine operator is able to market lump coal at a price yielding a substantial profit, the screenings may have little market value, owing to lack of demand. The ability of the operator to produce the lump coal is dependent upon his ability to dispose of his screenings. To a limited extent they can be taken care of on cars on mine tracks; but that storage capacity is soon exhausted, and if the profitable lump is to be produced and shipped, the screenings must be disposed of, many times at prices in themselves unprofitable. Such surplus sizes are sometimes sold at extremely low prices, and have a tendency to demoralize the market.

The third of the difficulties referred to above arises from the fact that the closing down of a mine does not relieve the operator of all expense. Not only does his overhead continue, as happens in practically all other industries, but he must expend substantial sums in preserving the physical condition of his property. Mines would deteriorate with great rapidity when not in operation, were not considerable amounts expended in maintaining them in good condition. Therefore, the minimum price that an operator might in some extreme cases be constrained to accept is not cost price, but cost less the loss involved in closing down.

RESULTS OF COÖPERATION

In spite of these difficulties under which the bituminous mining industry labors, and in spite of special obstacles created in the past by the War, by transportation disability and by labor difficulties, the financial condition of the industry is less unfavorable than is frequently assumed, and as a result of its self-regulating activities and the coöperative effort of its local and national associations, that condition is steadily improving. The National Coal Association has recently made a study of the financial returns realized by the industry over a two-year period. That investigation shows that, on the average, coal has been sold at a small profit, and that the amount of the profit has been slowly increasing. At the same time, it must be acknowledged that it is today far below what it should be to yield a reasonable return on the investment.

On the technical side, the art of coal mining has been carried to a high degree of perfection, as is shown by the relatively large output per man in the United States, as compared with other countries. Costs of operation have been correspondingly reduced. The uneconomic practices of the industry have been connected not with the mining of coal, but with the selling of coal. It is to the market side of the coal industry that much attention is now being given, not only by the operators individually, but by their local and national associations.

Larger producing units will have a tendency to stabilize the market, and the formation of such units through the combination of small companies is one of the developments of the present time. The larger companies will not be so likely to fall into financial straits, where they will be obliged to sell their product at any price obtainable in order to meet pressing liabilities. As a result of such consolidations, the amount of mining under financial duress will be reduced, and less coal will be forced upon the market at prices below the level of a reasonable profit.

The formation of coöperative selling agencies may be counted upon to further the same purpose, namely, to reduce the amount of coal put upon the market at unremunerative prices. Such coöperative agencies, if properly administered and controlled, may be a powerful factor in stabilizing prices at a profitable level through the elimination of uneconomic, cut-throat competition.

The trade practice movement may be counted upon to eliminate a number of unfair trade practices which, while not specifically illegal, are yet in their effects harmful to society, as well as to the members of the industry. I need not enter upon a description of the trade practice movement, since there are now few industries which are not familiar with this method of eliminating unfair competitive practices.

In the bituminous mining industry the adoption of codes of trade ethics has as yet been confined to local associations, a number of which are now operating under such codes with very beneficial results. Only recently has one of these local codes been taken up for consideration in a trade practice conference with the Federal Trade Commission. The interest in the movement is widespread in the industry and it is certain that many more local codes will soon be adopted, and a national code is reasonably to be looked for. The observance of the principles laid down in these codes of fair trade practices will do much to promote the stabilization and economic functioning of the bituminous mining business.

SUMMARY

There is little to be said about a trust movement in the bituminous mining industry. I have described some of the conditions which make this industry unusually difficult to stabilize, especially the seasonal demand and the impossibility of building up producers' stocks, which result in an unavoidable fluctuation in the operation of bituminous mines. I have pointed out that the number of competing units in the industry renders it practically impossible to remedy conditions by the formation of a "trust," but I have called attention to the fact that, in other ways, it is working into a more satisfactory financial position. Conditions are improving through the self-regulation and self-control of the industry, and its primary handicap, a fluctuating demand and unavoidable overcapacity at times when demand is below the maximum, creates a situation which cannot be cured by any exercise of Federal or state control.

The Merger Movement in the Motion Picture Industry

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IT is universally agreed that the motion picture industry is today one of the leading industries of America. The rapid transition of motion pictures from the arcade penny peepshows of yesterday to the colossal feature films of today is without parallel. Within a period of a little over two decades, the industry has progressed by such unprecedented leaps and bounds that today it is of gigantic proportions. The legal status of its representative component units in their various workings is in some ways yet undetermined and undefined at law, because of the fact that the industry is of such comparatively recent origin, and also because it has had such rapid and unusual growth.

From the business of merely producing motion pictures, the leading organizations in the industry have of recent years reached out into the field of distributing their own productions, while several have even gone to the extent of controlling and operating theaters for the exhibition of their own productions.

LEGAL EFFECTS NOT DETERMINED

The question as to what extent and under what circumstances motion picture companies, without violating the Sherman Anti-Trust Act and the amendments and statutory enactments that supplement this Law, can operate in the distribution and public exhibition of their own productions is not yet settled at law, although test cases on these issues are now pending, on appeal, in the upper courts. Some of the purported objectionable features of distribution and exhibition that have been put in issue at law by the Government, through the Department of Justice and the Federal Trade Commission, have already been conformed to, and thus obviated, by the defendant companies themselves. A few of the issues, however, remain as yet unsettled at law. Premising that those remaining contentions will be duly determined and that proper adaptation will be made by the picture companies to any constraint that may be finally sustained at law, the discussion in this article is limited to the question: To what extent and under what circumstances, so far as can be fairly deduced and determined, can motion picture companies, as such, legally combine and operate?

Unfortunately, no judicial decisions have been rendered in the instance of motion picture mergers. Therefore, in discussing this subject, we can only proceed by analogy from decisions rendered in cases of merger in other industries, necessarily bearing in mind, however, the distinctive and controlling features that are peculiar to the motion picture industry itself, for the so-called "rule of reason" which the Supreme Court of the United States, in the epochal Standard Oil and American Tobacco cases, laid down eighteen years ago as applicable in all such cases, must be applied separately to each new set of facts arising in any given case. That "rule of reason" was founded upon public policy and was designed to guard society against economic oppression in cases where there appeared to be a suppression or

stifling of free competition. But, in applying the "rule of reason," the truth, as Justice Stone expressed it in the Trenton Potteries case,[1] must be observed, namely, that "reasonableness is not a concept of definite and unchanging content." In mergers, therefore, the particular facts of each consolidation must be scrutinized—the circumstances of the formation, the method of the formation, the motivating factors back of the formation, the policies pursued and their effect, the detriments to independent rivals and the advantages accruing to customers and consumers.

TREND OF THE LAW

In ascertaining the trend of the law in the adjudicated cases in which the "rule of reason" has been invoked judicially, it is necessary to scrutinize comprehensively the adjudications in the various leading cases. But, in a brief article such as this, the trend of the law as revealed in the leading cases can be traced only in a most limited way.

The leading cases to date on this particular phase of the law are given below.[2] These cases reveal the trend of the law and furnish proper premises from which to philosophize on principles appertaining to industrial mergers.

There is clearly no rigid rule nor inflexible standard by which industrial mergers can be tested as to legality or non-legality of existence. Too liberal license and too wide freedom of action in industrial amalgamation is bad, as is also too narrow restriction. If, however, in any instance it is evident that the consolidation is for the purpose of obtaining the natural advantages derived from reduced cost of maintenance, greater efficiency of methods and better quality of product, then the consolidation is not only legal, but is economically desirable. On the other hand, the courts do not overlook the fact that a business merger may be actuated by motives economically bad and indefensible at law. The features, phases and effects of each merger, separately, as stated, must be scrutinized. But, it will be seen in studying the cases cited that the Supreme Court has deduced fairly definite standards and tests in passing upon the legality of any industrial merger. In general, economic desirability and business expediency are the criteria that have guided it in its findings. In applying the law, there has been more and more an adaptation to business soundness, with the result that the confusions and perplexities that formerly confronted lawyers as to just what factors in business mergers were controlling in the minds of the Supreme Court justices have been, in the main, cleared up.

It is to be noted, too, that many businesses have been relieved from the prohibitions imposed by the anti-trust laws. This has been brought about by legislative enactments, but the businesses exempted have, however, been placed, by law, under the supervision and regulation of governmental administrative bodies. In some cases, these regulatory bodies were already in existence, while in others they were specially created, in recognition of the fact that the particular industry in question needed special regulation. With the exception of the industries that come within the category of the Webb-Pomerene Act and the Coöperative Marketing enactments, all of the industries exempted from the prohibitions imposed by the anti-trust laws have been "affected with a public interest." Even banking, insurance and marine shipping have been accorded partial and conditional exemption, as it were, on that basis. The question of the wisdom of exempting the last-mentioned industry, even conditionally, is debatable, but cannot be gone into here. Suffice it to say that there does exist the general policy of granting exemptions to industries affected with a public interest. Of course, the precise category of "public utilities" cannot be determined. Therefore, Congress, in its efforts to regulate industrial organization, and the Supreme Court, in its interpreting and apparent "making" of law, fall back upon the demands of public interest and general welfare.

Of one hundred and seventy-four prosecutions by the Government from 1890 to 1927 under the Anti-Trust Act, it is significant to note that only thirty-eight were predicated primarily upon corporate consolidation, and that in less than ten percent of the entire number of anti-trust cases have industrial mergers, as such, been the subjects of complaint. In this connection, too, it is significant that collusive trade agreements and interference with business rights have called for more drastic restrictions than those imposed upon the merging of competing units in an industry. Inasmuch as business mergers wield exceptional power over supply, output and prices, the need of proper legal constraints is at once apparent.

The motion picture industry, like other industries, has business phases and elements peculiar to itself. The efforts of United States Senator Brookhart, to have the motion picture industry placed by law under the supervision of a specially created administrative body at Washington, failed. That proposal was not predicated upon instances of mergers in the industry, but mainly upon distribution and exhibition of the products of the business.

MERGERS AND THE "PUBLIC INTEREST"

So far as mergers alone are concerned, it is significant that while the motion picture industry is not "affected with a public interest," nevertheless, the public is in a wide, comprehensive way very directly concerned. If the effect of mergers of motion picture companies will be to present better pictures to the public and at lower cost to the public, then such result is to be welcomed socially, economically and at law. In entertaining, amusing or instructing the public by way of motion pictures, the quality of the pictures and the cost to the public are the main tests of desirable effectiveness, in instances of merger. So vitally do motion picture entertainment and amusement form a part of the everyday social life of the masses that the benefits to the public are necessarily most important factors. On the other hand, if the consolidation has the effect of crushing competitors or of stifling competition, and thereby creating a monopoly, that result is repugnant economically and in direct contravention of the anti-trust laws.

Today large capital is essential in instituting a plant for production of motion pictures, especially in equipping "talkie" units. True, too, there is vast waste incurred in the production

[1] 273 U. S. 396.

[2] *U. S.* v. *E. I. DuPont de Nemours & Co.*, 188 Fed. Rep. 127 (1911); *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61 (1912); *U. S.* v. *Reading Co.*, 226 U. S. 324 (1912); *U. S.* v. *Winslow*, 227 U. S. 202 (1912); *U. S.* v. *Terminal R. R. Assn.*, 224 U. S. 383 (1912); *U. S.* v. *National Cash Register Co.*, 201 Fed. Rep. 697 (1913); *U. S.* v. *Internat'l Harvester Co.*, 214 Fed. Rep. 987 (1914); *U. S.* v. *Keystone Watch Case Co.*, 218 Fed. Rep. 502 (1915); *U. S.* v. *Eastman Kodak Co.*, 226 Fed. Rep. 62 (1915); *U. S.* v. *American Can Co.*, 230 Fed. Rep. 859 (1916); *U. S.* v. *Corn Products Refining Co.*, 234 Fed. Rep. 964 (1916); *U. S.* v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918); *U. S.* v. *Reading Co. et al.*, 253 U. S. 26 (1920); *U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417 (1920); *U. S.* v. *United Shoe Machinery Co.*, 258 U. S. 451 (1922); *U. S.* v. *Southern Pacific R. R. Co.*, 259 U. S. 214 (1922); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927); *U. S.* v. *Swift and Co.*, 276 U. S. 311 (1928).

of motion pictures. Likewise, numerous specialized departments, staffs of skilled artists and artisans are used. Extensive laboratories must be maintained. Countless and unusual so-called "props" or properties of personalty have to be assembled and kept for varying uses as the occasion arises. Research must be employed continually. Further, the demands for output of pictures is enormous. Uncertainty as to quality and marketableness of the output exists over a protracted period, until, as a matter of fact, each production, upon completion, is separately viewed and, in "talkies," heard, in its ensemble effect.

These are some of the salient facts of the motion picture business. Therefore, it can readily be seen that mergers may carry many economic advantages in the producing of motion pictures. Especially would it seem that in the carrying out of extensive and permanent educational programs and courses for schools effectiveness in production might be enhanced by consolidation of producing units. On the other hand, nothing can be thought of as more undesirable than the foisting of unworthy productions on the public, a condition which can more easily spring from monopoly than from keen competition. Indifference to bad productions would inevitably be lessened by alert competition. Further, if the motive in a merger is to corner the massive returns accruing from the syndication of productions, and if monetary gain is the controlling incentive, then serious detriment would result from such merger.

To the writer of this article, it appears that the recent mergers in the motion picture industry were not made for the purpose of lessening waste in production or diminishing the costs of production. Further, it is not apparent that the costs to the public are to be lessened. Besides, the aim for "bigger and better pictures" seems to be sponsored by all the producing companies, both large and small. Competition may be the best means to promote that end.

Application of the Clayton Act

The main problems facing the industry are connected with distribution, theater control and theater operating, as well as with the application of the Clayton Act to consolidations within the industry.

Section VII of the Clayton Act, passed in 1914, forbids any corporation engaged in interstate commerce to acquire or hold any of the capital stock of a competing corporation engaged in the same line of business

> where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition . . . or tend to create a monopoly in any line of commerce.

That section also forbids any corporation to acquire the whole or any part of the stock of two or more corporations engaged in the same line of commerce when a similar effect might occur.

During the past month, pleadings at law have been filed in formal protest against certain specified motion picture companies, alleging that the latter have violated Section VII of the Clayton Act.

The first case testing this provision of the Clayton Act was that of *Aluminum Company of America* v. *Federal Trade Commission*,[3] brought in 1922. The respondent company in that case was admitted to be the dominant unit in the aluminum industry. Further, it appeared that in 1918 the Aluminum Company of America arranged with a competing company, the Cleveland

[3] 284 Fed. Rep. 401.

Metal Products Company, whereby a new company was to be formed which was to purchase the plant of the Cleveland Company, at an agreed price. In this new company, the Aluminum Company of America purchased four hundred thousand dollars' worth of the capital stock issued, while the Cleveland Company took the remaining two hundred thousand dollars.

It was held in that case that the new company acquired not only the plant, but also "the growing business" of the Cleveland Company. In answer to the contention that the transaction was merely an above-board, legitimate business transaction in which simply a subsidiary company was formed to extend the field of operations and that the effect was of benefit to all concerned, even including the public, the Court said:

> It is persuasively urged that the arrangement was not a device intended to get around the Clayton Act, but was a plain business transaction. . . . With these matters, we have no present concern. They have to do with the motive for the transaction. We have to do only with the "*effect*" of the transaction; and with its effect only as it may lessen competition . . . or tend to create a monopoly . . . ; we limit our decision to the question whether, within the policy of the Clayton Act, the transaction comes within the definition of the section. In this we are of the opinion that it does.

This opinion indicates that consolidation by means of stock acquisition in a business might render the absorbing company liable under the Clayton Act, though not under the Sherman Act. Unfortunately, no appeal was taken from this decision; therefore, the view the Supreme Court would have taken is not known. However, since then three other orders issued by the Federal Trade Commission, under Section VII of the Clayton Act, have reached the Supreme Court.[4] In each of those cases, the corporation absorbing the competing companies was admitted to be a dominant unit in the industry. The Supreme Court in its decision appears to have taken the ground, although it does not explicitly say so, that the acquisition of stock in a competing company, when that acquisition does away with the competition that previously existed between those companies, is, of itself, no matter how large or small may be the absorbing or absorbed company, a violation of Section VII of the Clayton Act. In the same decision, the Supreme Court, overruling the Circuit Court of Appeals, held that though the stock acquisition might be in violation of the substantive part of the Clayton Act, remedy could not be had under the procedural provision of that Act if full title to the assets of the absorbed company had vested in the company acquiring the stock. This holding of the Court, that mergers through stock acquisition unassailable under the Sherman Act as now interpreted may be unlawful under the substantive provision of the Clayton Act and, yet, that the remedial results may at the same time be evaded if a transfer of the assets has been effected before the Federal Trade Commission has instituted proceedings, furnishes a singular anomaly which Congress, of course, did not foresee.

Very recently two suits under the Clayton Act were instituted by the Government against motion picture companies. In one of those suits, Fox Theaters Corporation, Fox Film Corporation and William Fox are named as defendants. This suit is based upon the absorption last February of Loew's, Incorporated, by the Fox interests. Loew's, Incorporated, in turn, controls Metro-Goldwyn-Mayer, Incorporated (a producing

[4] 272 U. S. 554 (1926).

unit) and the Metro-Goldwyn-Mayer Distributing Corporation.

It is alleged that when the Fox group and the Metro-Goldwyn-Mayer group were operating in competition their combined output amounted to about forty percent of the total production in the industry in America. It is also alleged that the Fox interests now control a large proportion of the best and largest first-run motion picture theaters throughout the country, and that in the New York metropolitan district their theater holdings embrace most of the first-run houses and total at least fifty percent of the seating capacity of all motion picture theaters of all classes. Further, it is alleged that last February the Fox interests obtained control of 435,000 shares of common stock in Loew's, Incorporated, and "have since planned, and still plan, to obtain more stock."

In the second suit, Warner Brothers Pictures, Incorporated, Stanley Company of America and First National Pictures, Incorporated, are named as co-defendants. In this suit, the complaint alleges that Warner Brothers Pictures, Incorporated, owns more than ninety-five percent of the common stock of the Stanley Company of America, and that the latter company, in turn, controls 25,041 shares of the stock of First National Pictures, Incorporated. It is further alleged that the Warner holdings in First National total 71,893 shares, the former company having purchased on November 1 the Fox holdings in First National, which amounted to 25,000 shares. It is also alleged that the Warner interests represent approximately twenty-five percent of the total production in the industry in America, having absorbed one subsidiary company and nearly all of another, which were previously competitors. It is further alleged that following those transactions the First National Company of Maryland was incorporated and that all the business and assets of the former First National Pictures, Incorporated, were transferred to the new company. First National Producing Corporation and First National Distributing Corporation were set up as subsidiaries of the Maryland Company.

In regard to these two cases, it is now being questioned in the courts whether the Fox interests and the Warner interests, at the time of the alleged acts set forth in the petition, were dominant units in the motion picture industry. But, just what the application and interpretation of the provisions of the Clayton Act will be, as determined by the courts, in the light of adjudged cases already mentioned and discussed herein and in the light of the facts arising in these two important cases, remains to be seen.

The Influence of Anti-Trust Legislation Upon the Technique of Industrial Organizations

By J. GEORGE FREDERICK

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"BIG business" in America in the past half century may be compared to a species of huge sun-flower which suddenly begins to grow in a garden in which before there were only small flowers. The gardeners are alarmed and try their best to clip back, stunt and even to eradicate the plant, and cry out that it will suffocate the rest of the garden, but it persists with ever increasing force and resourcefulness, although the frantic efforts of the gardeners do result in changing the sun-flower's shape, color and form.

Industrial organizations assuredly have been "clipped back," stunted and twisted into new shapes by the gardeners—the legislators—but, equally obviously, the species has been so hardy, the soil so ripe and ready for them, that they have grown not only in constantly increasing number but also in constantly increasing size. Moreover, the plant has become more useful and more popular, reacting upon the rest of the garden in a manner admittedly stimulative and salutary. Even the gardeners have lost much of their fright and animosity; while the entire garden now takes on, more and more, a giant character.

FIRST EFFECTS

The first effect of the famous Sherman Anti-Trust Law of 1890 was to shake "big business" to its roots, for this blow of the gardener's axe was one of the most hard-hitting and unequivocal pieces of legislation ever enacted. "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade," was the language of Section I of the Act, with personal punishment for violation. This great growth in the quiet little garden of small plants was to be killed, root and branch. The issue was squarely joined and a terrific struggle ensued for the next dozen years, culminating in the hectic anti-trust conferences and nation-wide outcries of 1900 and 1901, passing through the panic of 1893 and the free silver craze on the way.

Never were stronger basic forces locked in battle. On the one side was the human fear of all things large, as well as the justifiable fear of great power in the hands of ruthless individualists. On the other side were the economic visions of men with imagination and the scientific spirit of the day, but also the untamed greed and unsocialized technique of men of power and ability.

ALTERATION IN MOTIVE

It was therefore inevitable that the first great alteration in the technique of industrial organization coming as a result of the crude Sherman Law should be *an alteration in motive and business morals*. The truth of the matter is that the motives and morals of *small* business had not been very high, and that when magnified by means of the device of the corporation into large scale business their glaring defects and dangers became very evident. When a small shoemaker is greedy, opportunistic, ruthless and scheming it is not a matter for much public alarm. But when that shoemaker organizes a great

many other shoemakers and hides behind the anonymity of a corporation, it assuredly does become a public concern. Moreover, this public concern multiplies itself *geometrically*, because unfamiliar size is alone a stimulator of fear. To so simple an equation as this can be reduced the "big business" alarm—which has by no means yet run its length. We had to develop a new business ethic and technique before we could endure the new leviathan of business.

STANDARDS CHANGE

Large scale business, then, called for a redefinition of business standards of morality; or, more accurately, a revision of the technique of fair play in terms of fiduciary responsibility, relationship to employees, to competition and to the public. It had to be recognized that a kind of commercial age of adulthood had been reached, a displacement of the self-centeredness of the child by the group consciousness of the adolescent, even if not yet the mature man. Our American pioneering, small scale business, built upon the personal tradition of the Yankee trader and peddler, prospector, settler and pioneer had to be made over into more socialized instincts before we could play with the dynamite and high tension electricity of large scale business. This was indeed a slow and painful process, for it had to do with *men* and their points of view, their technique of motivation and their conceptions of the technique of organization. A righteous Roosevelt had to "shake the big stick" over the heads of the "malefactors of great wealth." A mob-megaphone like Bryan had to be invoked to stir the public herd to rouse itself politically, to separate big business and politics from their ugly *liaisons*. A virtual "lynch law" such as the Sherman Law constitutes, roughly speaking, had to be enacted and persecutions threatened and begun under it before the hard and brittle individualism of some innovators of large scale business could be broken open and a new leadership, under a new technique, substituted.

NAPOLEONIC CONCEPT DISPLACED

What was this new technique, coming with the beginning of the new century? It had two aspects. Let us examine, first, the introduction of the line-and-staff conception of organization, displacing the "Napoleonic" conception of organization. I call the old methods of organization "Napoleonic" because it is known that Napoleon granted little authority or dignity to his inferiors, even tweaking the ears of the aides next to him, in full view of his army, to indicate how absolute a monarch he was. Czarism would be an equally good name. It is the technique of the dictator, the uncompromising individualist. It reserves to itself all authority, although it does not hesitate to impose heavy responsibility. It is accountable to no one, and bases its decisions on the "personal genius" theory. It uses a great deal of fear, favoritism and "driving" in its employee relationship and is hostile to the specialist and the expert; and at the same time is motivated by a personal power motive, if not also a personal profit motive. Its prototype is well known in all history, in the little kingdoms of dukes and princes, with their fawning followers. It is distinctly anti-social.

I have purposely drawn this picture vividly, for it is not an unjust description of the technique of organization which operated large scale business until the turn of the century; indeed, it describes many fairly sizable businesses of today which have not been modernized. It was Andrew Carnegie who

first applied with especial definiteness the line-and-staff principle in large scale business. He used a group of "partners" and specialists in whom he reposed complete power and authority, as well as a generous share of profits. As a result he made phenomenal progress in steel manufacture, to such an extent that a great merger became almost imperative to prevent the collapse of Carnegie's competitors. At the same time, the doom of the old Napoleonic conception of business organization was rung.

SOCIALIZED MOTIVATION

This new merger, formed by J. P. Morgan, at once proceeded, wisely, to apply also the second new technique to which I refer, namely, the technique of upright, socialized motivation. The success of the United States Steel Corporation was assured when Elbert H. Gary was persuaded to head it, for it was precisely the art and technique of upright socialization which Gary—a lawyer and a judge—best knew. He set his head firmly against monopoly, refusing to control even as high a percentage of the steel business as the Supreme Court had deemed a safe one, this side of monopoly. Quite as important, he set the seal of doom upon policy of corporate secrecy and opened the books of the company to the public to an extent undreamed of before in business. He entered into a program of employee welfare, and employee stock-owning participation unknown before as a technique. He made himself accessible to the press to an extent unknown before among the "big-whigs" of business. In short, he set absolutely new technical fashions for large scale business, and permitted the Sherman Law to mold the technique of large scale business by wholeheartedly conforming to it. It is surely a remarkable tribute to his genius in this that, despite the furiously boiling anti-trust agitations and persecutions, the United States Steel Corporation, largest of all consolidations, and freely referred to as a "trust," was never prosecuted. Gary realistically conformed his technique to the Sherman Law, recognizing its great force and tenacious place in American psychology, and then took great strides in the new direction. That he could have made a few more strides during the last decade of his life is conceded, but his day was done and new techniques of a new large scale era were possibly beyond his genuis at his advanced age. It is enough glory for one man that, at a most crucial time in the history of American industrial history, he set the pace which for two decades was a model for modern business in large scale technique.

The upright example of the United States Steel Corporation helped to put to shame the secretive, hard-boiled big business units which were still operating the old techniques, particularly the Napoleonic and the unethical, scheming techniques. A new leadership gradually evolved. But the monopolistic tendency still gave cause for alarm in other fields of industry and we had the abortive technique of "unscrambling scrambled eggs," the cutting into pieces of the Standard Oil and American Tobacco companies in 1911. This gave rise to the "interlocking directorate" method by which the Solons of big business twisted their plans to fit the Sherman Law, and this, too, brought its repercussions and modifications of purely financial technique.

THE HOLDING COMPANY

The most significant of these modifications of technique is undoubtedly the "holding company." It is an unimpeachable fact that even monopoly is possible today, without legal danger,

under the holding corporation principle. "Control" of industry is an entirely feasible thing through this device, which demonstrates what is commonly admitted, that the Sherman Anti-Trust Law has been outwitted by the technical devices of business and finance. However, monopoly even by the indirect route of holding corporations is not widespread because monopoly is not altogether sound business from other points of view than the legal one. There are those, to be sure,[1] who, like the Bolsheviki, believe that we are approaching an era of even larger super-corporations, one to an industry, and perhaps even one universal, all-embracing corporation. This would unquestionably be under still closer Federal supervision, a subject which has only recently been discussed in Congress. But business is today not really antagonistic to a mild form of "regulation." Banking, railroad and insurance corporations are under regulation, and the settled policy of both political parties is to do a minimum of regulation and to allow a maximum of self-government and initiative by business, consistent with broad public policy and the famous "rule of reason" as enunciated by the Supreme Court. Mere bigness is no longer cause for alarm and persecution, as it once was. Shrewd opinion[2] is that not even a revision of the anti-trust laws, urged by some, could evolve, in all likelihood, a more reasonable policy and plan than the net result of eighteen years of construction and application by the Supreme Court.

Five major modifications of technique, under the benign encouragement of this "rule of reason" as enunciated by the Supreme Court, have taken place.

[1] Bassett, William R., "Where is the Merger Movement Leading To?" *Printer's Ink*, September 26, 1929.

[2] Gilbert H. Montague, before the Michigan State Bar Association, September 13, 1929.

COMPETITION ALTERED

The *first* of these has been a rather striking revision of the old ideas of *competition*. The American people always made an utter fetish of competition until the European War. It seemed as though their parochial conception of competition in business was destined to harry business to the end of its days. The old-time business organizations as well as the Sherman Law itself focused fanatically on competition as a magic word. Today the bitter rate wars of the early oil days and also early railway days seem unreal. Competitive warfare now seems somewhat street-gamin-like to us. It is not the way of enlightened big business of today. At first big business believed that the only cure for the shambles of competition was consolidation, with monopoly as the logical ideal, for then you would have no competitor to set a costly pace. But this phase has been passed; it is not a good technique. Monopoly often means retrogression, even if the Sherman Law were not operative. Just as man is now learning to *fight Nature* rather than destructively to fight man, so large scale business is learning to *create new markets and increase consumption*, rather than fight with competitors over the market that exists. The automobile field, at this saturation stage of its career, could easily descend to the old suicidal shambles if it applied old-time oil methods; but it prefers to go to the farthest ends of the earth to create a new user rather than cut throats over the trade of an old user. This is a technique traceable to the Sherman Law and particularly its extension, the Clayton Act, with their emphasis upon unfair competition. War time experience with co-

operation and the new vigilance of the Federal Trade Commission in regard to unfair competition have brought forth a significant fruit, the formation of "institutes," active trade associations and affiliations which are no longer virulently competitive, but *coöperatively creative*. Indeed, in many instances such forms of coöperative action are actually taking the place of mergers and consolidations, because they make possible, under the more clearly defined rights of trade associations today, actions which in the heat of old trust-busting days would have been regarded as violations of the Sherman Law. The modernized trade association and the "institute," which have radically altered their character in recent years, are therefore new developments in the techniques of industrial organization closely related to anti-trust legislation. Their actions are very closely watched and held within legal bounds, as redefined in the maple flooring and cement cases in the Supreme Court. President Hoover has been a particular friend of the trade association, stoutly defending, as a practical economist, the importance of permitting such associations, without anti-trust suspicions, to collect and analyze the statistics of their industries and thus help stabilize them. No technique which has grown up under the cooler tolerance of anti-trust law legislation has had more far-reaching effects. They healthily revive the values and techniques of the medieval craft-guilds.

CONSTRUCTIVE COMPETITION

As a matter of fact, "competition," which the Sherman and the Clayton Acts endeavored so hard to turn into an American sacred codfish, is no more assured by those laws than by the control of monopoly. The instructions of the Supreme Court, even when scrupulously carried out to the letter, do not preserve "competition" in the old sense which the framers of the laws had in mind. It has truly been said that there is more violation of the spirit of the anti-trust laws by small business than by large business, since more or less ruthless and destructive "competition" is today practiced mainly by the "small fellows" in their desperation for business; and practiced to their own detriment.

Coöperation among the larger companies is growing, definitely molded by anti-trust law conditions. Thus we find the Parker Pen Company and the W. A. Shaeffer Pen Company forming a holding company together, pooling their patents for fountain pen desk sets and licensing other manufacturers to make the goods. In this way a destructive competitive situation in this field is overcome. We also see in the Webb Export Trade Act the permitting of combinations for this purpose of selling to other countries, in a manner which would not be legal for domestic selling. Thus business, aided by a wise Supreme Court, has worked out quite constructively a technique which permits business to function without feeling the anti-trust law halter too tightly.

EMPLOYEE STOCK OWNERSHIP

The *second* technique influenced by anti-trust legislation, however indirectly, has been *employee stock ownership*. The example of the United States Steel Corporation was widely followed and has gradually induced a double reaction: first, the practical abolition of the labor-capital warfare, and second, a relaxation of the common man's hatred for large scale industrial organization. We are today a nation of corporation stockholders, estimated by many at fifteen million, and we are no longer a nation of "corporation baiters." The much-

mooted cycle of high wages, low prices, increased consumption, increased prosperity and production is, in itself, a product of the new techniques of industrial organization primarily stimulated into being by anti-trust agitation.

PATRONAGE ELIMINATED

The *third* technique is that of *the rule of merit*. It is not today realized by a great many people how personal and purely individualistic were the policies and tenures of office of the top executives of old-time business. Yet one can see in England today a graphic picture of what America was forty or fifty years ago: with founders and sons, and grandsons of founders, sitting in office by force of ownership, inheritance or favoritism—with actual merit only occasionally present. Merging, reorganization and consolidation in America has meant a most prophylactic alteration in policy and executive direction, in a majority (but, of course, not all) cases. In the past twenty years a surprisingly large number of "founders," owners or inheritors have surrendered their businesses to others who have no personal desire to rule the organization, the top executive being engaged purely on a professional basis of capacity to function, usually from the ranks of the workers. Bankers do not today, as they once did, place their polo field comrades at the head of businesses they control; they have had too costly experiences with such favoritism.

RESEARCH STIMULATED

Fourth, an indirect but definite stimulation has occured to *research*. The earlier conception of the advantages of consolidation had been to reduce costs and more easily to control or monopolize the market. The anti-trust laws tending to foster competition and prevent monopoly, the consolidation turned increasingly toward science and research to provide a *natural* or technical monopoly (of patents, ideas or methods) to take the place of the *commodity* monopoly for which sanction had been refused.

It is a fact, as recent research has shown,[3] that the consolidations have made greater advances in research than individual, "independent" companies. The resources of such larger companies are more adequate for research and their possibilities greater for profiting from their researches.

HORIZONTAL VERSUS VERTICAL COMBINATIONS

Fifth, the general changes of technique which are observable are the *forms* which the new mergers and consolidations take; all carefully conscious of the anti-trust laws. At the beginning of the merger period we had the fallacious idea of monopoly and control of price, which prompted *horizontal* mergers; mergers, that is to say, of a number of companies in the same field of business, the intent being to lessen competition. This proved a fallacy in a great many instances—so much so that at one time Justice Brandeis of the Supreme Court, prior to his occupancy of the bench, declared his belief that large scale consolidation was not an inherently sound business method. Horizontal merging is not now greatly in the foreground because of considerable disillusion with it. Five weak companies cannot when merged make one strong one, except in special circumstances.

Then there arose the *vertical* consolidation (the United States Steel Corporation being an outstanding example). This set up new standards of performance and new hopes of profit, and they have been realized in all cases where intelligently applied. The General Motors Corporation and Ford represent vertical consolidations, endeavoring to control all operations from mine to consumer. The vertical consolidation exists, undeniably, under the "rule of reason" of the Sherman Law. That it must keep from any semblance of monopoly is indicated by the failure of the projected huge three billion dollar Ward Food Products Corporation to obtain Government sanction. It appeared to threaten control of a dangerously high percentage of manufactured breadstuffs. Yet some of the companies which were to have entered this merger are now in another large food merger, but with the difference that instead of being in a *vertical* consolidation they are in an entirely new form—a *circular* consolidation. This type is selective, not of articles which form one homogeneous group, such as yeast, flour, bread, and so forth (as in the Ward case), but a group that is unrelated *except as to channels of distribution*. Thus, we have the General Food Products Company, which has assembled a dozen or more companies —gelatine, chocolate, breakfast food, coffee companies, and so forth—all sold through the grocery. In such a consolidation there is no active danger of monopoly, and thus there are no anti-trust law action possibilities. For this legal reason of a clear track, with no legislative danger signals, the circular form of consolidation has proceeded with amazing rapidity in recent years, the driving force being the need for cutting distribution costs, which can be done in this way. The proposed Ward Food Products Corporation made a gesture, in its charter, of devoting some of its profits to charity and welfare work, obviously a sop to public opinion, in view of its tendency to monopolize breadstuffs, and thus the danger of invoking the Sherman Law. This kind of paternalistic technique, influenced by anti-trust law dangers, is happily not by way of being encouraged. However wisely and graciously a Rockefeller may dispense his millions of corporation profits for human welfare, the new conception of business life in America, as influenced by the Sherman and the Clayton Acts, is not that of more, but less, paternalism. The self-reliant American conception of character calls for a diffusion of corporate income among many public stockholders. This calls for large, stable industrial organization and a form of industrial organization which recognizes the practical realities of anti-trust legislation, very unlikely to be changed for many years to come.

THE CONSULTATIVE PLAN

It is natural that under the consultative plan, begun in Coolidge's Administration and still operated—whereby plans for mergers are put up to the Department of Justice in advance of their actual formation—there is a continuing effect upon the technique of consolidations. If a proposed plan is submitted and the Department makes only minor criticisms, the plan is often changed to meet the criticisms. Often rather radical changes are made; and in other cases, as in the proposed Ward Food Products Corporation, there is sometimes an absolute refusal to sanction the plan, minor changes being of no avail. The Department of Justice anti-trust division thus has a very serious task in its care. It has recently asked for $75,000 more appropriation, $208,000 being its present budget. Sixteen attorneys are on the staff, and with the increasing number of mergers the work is heavy. But the result is that business is proving far more tractable and amenable to the technical conformations demanded than ever before. There is no question but that the situation is not very clear

[3] *Mergers in Industry*. National Industrial Conference Board, 1929.

nor very sound, for strict logic would call for modernizing our anti-trust laws. Secretary of Labor Davis would like to re-create the textile and coal industries by this means. As this is a function of Congress, however, whose economic intelligence business distrusts, there is an inertia on the part of business men. They frankly believe that—as in the case of the tariff—Congress would more likely mess up than clean up the anti-trust situation!

CONGRESSIONAL DISTRUST

For these reasons no changes in the anti-trust laws as they stand may be expected soon, although reasonable modifications to improve their administration, in a spirit of sound understanding of the techniques of business, are more or less constantly going on administratively and through court opinion. There are at present plenty of inconsistencies, such as firms operating under permanent court decrees which enjoin them from doing what their competitors, unmolested, are constantly engaged in doing! Thus we have today the natural desire of the meat packers for modification of the famous "packers consent decree" of 1920, permitting the packers to maintain retail meat markets. There is every reason to believe that the changes during these nine years both of public temper and knowledge of business technique now make such a move desirable in the interests of consumers. The packers of 1930 will certainly be quite different in their conception of public service, for we have learned much of the technique of distribution, and the packers' old-time arrogance and backward conceptions of their responsibilities have been displaced by new conceptions, even new ownerships and controls. Whereas once retailers burned the large mail order company catalogs at public burnings in the public square, today they actually petition them to locate their retail branch store in the town! This change is symptomatic of our general change of attitude and commerical technique: fewer bristling antagonisms and prejudices, and a far better sense of our mutual interdependence for prosperity. It is all a matter of broader grasp of merchandising technique and business standards; and, however crude, the Sherman Law and the Clayton Act have been powerful basic influences in their shaping.

Changing Investments and the Anti-Trust Laws

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THERE can be little doubt of the fact that there is today in this country an unprecedentedly widespread distribution of stocks among all classes of people, and that there has developed a marked tendency in one direction with regard to this particular condition. However, the effects of this tendency and its relation to the specific problem of this paper can, at best, be but the personal estimate and opinion of the writer. Needless to say, on a matter so recent, the data are still incomplete.

Is it true that types of investment are undergoing a revolutionary change? It is but a comparatively short time since considerations of investment were primarily along the lines of real estate. The largest proportion of the wealth of the nation was in real property. As long as the majority of our population lived in the country, they thought of investment in terms of the purchase and sale of land. It was during this period that the anti-trust laws were enacted. Some idea of the extent of this change may be gained from the following table.

From this table it may be seen that, although the value of real estate has greatly increased, the proportion of the value of real estate to the total wealth of the United States has just as steadily decreased. Real estate has become of relatively less importance, and other forms of wealth of comparatively greater importance.

A decline in real estate means a proportional increase in the value of some other factor. If we turn to figures of stocks, bonds and notes, for approximately the same period, we may see the source of this increase.

Year	Capital Issues of Corporations (in thousands of dollars)
1907....	1,393,913
1910....	1,518,272
1912....	2,253,587
1920....	3,106,931
1922....	3,423,948
1927....	5,970,297

From data published by the United States Department of Commerce.

Since 1907, the number of stockholders in the United States has increased to the proportions of a sizable army. It would seem that many of those who formerly invested in real estate are now trading in stocks and bonds. At any rate, the trend in real estate has been downward, while the

Year	Total Wealth of United States (in millions of dollars)	Value of Taxable Real Property (in millions of dollars)	Percent of the Total
1900.....	88,517	69,848	78.4
1904.....	107,104	83,801	77.5
1912.....	186,300	141,700	75.8
1922.....	320,804	229,406	71.5

Based on data published by the United States Department of Commerce.

trend of investment in stocks has been upward.

EFFECT OF SHIFT IN POPULATION

Another development, which had much to do with the two trends already noted, is the increase of the urban, and the decline of the rural, population. During the same period that investment in real estate declined, the rural population also declined; that is, the increase in stock investment was taking place simultaneously with the movement of the population from rural to urban areas.

There are modern conveniences in stock distribution which bring the stock and bond market nearer to the rural population. Large brokerage houses have branch houses and agents in most of the smaller cities. Some establish direct connection through private wire to New York. Another factor is the rapidly extending field of activity known as branch banking, by which the credit and investment facilities of the largest banks are made available through their branch banks in the smaller cities and towns. There have been two tendencies at work at the same time: the shift of population bringing more people nearer to the stock market; the branch brokerage houses and branch banks taking the market nearer to the rural population.

COMPARATIVE URBAN AND RURAL POPULATION OF THE UNITED STATES

Year	Urban		Rural	
	Number	Percent of Total	Number	Percent of Total
1920	54,304,603	51.4	51,406,017	48.6
1910	42,166,120	45.8	49,806,146	54.2
1900	30,380,433	40.0	45,614,142	60.0
1890	22,298,359	35.4	40,649,355	64.6
1880	14,358,167	28.6	35,797,616	71.4

As people drifted to the city, they became more conscious of the stock market. They were brought into contact with groups already familiar with stocks. A glance at conditions in the average city today shows graphically the educational process with regard to stocks and the market that is unceasingly going on. The language of the city, and of the city press, is the language of those accustomed to stocks and bonds. The distribution of stock advertising literature is carried on by every type of advertising scheme. Stock is sold in this manner on the street cars of Philadelphia. There the traction company offers to sell stock on the instalment basis. This, then, has been the influence that has been exerted on increasingly large numbers of people.

EXTENDED OWNERSHIP THROUGH MERGERS

Other influences have contributed to the wide distribution of stock ownership in the United States. The need for iarger capital, the desire to conduct national advertising campaigns, the savings of chain management and chain bookkeeping, have been among the inducements which have led corporations to merge. Every day brings news of new mergers. A recent article advises that General Motors and the Radio Corporation, already great mergers in themselves, will merge into one gigantic business.

Chain stores furnish another example of the rapid growth of the merger movement. Such stores are particularly well established in the following fields: shoe stores, grocery stores, baking shops, restaurants, cigar stores, five and ten cent stores, department stores, theaters, motion picture production and hotels.

The number of stockholders of large corporations has been a matter of frequent comment. It is significant that, of the many owners of the American Telephone and Telegraph Company, there is not one controlling more than one percent of the stock. The figures given below with regard to the three named corporations will illustrate this point graphically:

Company	Number of Stockholders
United States Steel Corporation	167,000
Pennsylvania Railroad Company	185,000
American Telephone and Telegraph Company	366,000

These three companies alone have three-quarters of a million owners.

Many corporations were formerly owned by one man, or by a small group of men, who, in accord with the present trend toward consolidation, released the stock to large numbers of shareholders. Thus, Andrew Carnegie personally owned the steel company which J. P. Morgan and Company bought and organized into the huge United States Steel Corporation of today. Corporations of this type whose stock is now generally owned are: the United States Steel Corporation, the Great Northern Railroad, the Standard Oil Company, the New York Central Railroad, the General Electric Company and the Union Pacific Railroad. This list is meant to be illustrative only, and is by no means exhaustive.

DIFFUSION OF STOCK OWNERSHIP

One of the greatest factors in the diffusion of stock is the policy of many companies to sell to their employees, usually by some instalment plan of payment. A recent survey indicated that in twenty-two corporations there were 315,000 employees, owning 4,250,000 shares of stock. The number of railroad and public utility stockholders was estimated to have doubled in the period 1918–1925, although these figures included others in addition to employees.

Some companies have not confined their stock sales campaigns to employees, but have invited the general public to participate in the instalment stock purchases, as well. Ownership of stock by employees has been found to promote coöperation between the managers and the employees. A share in the profits through employee stock ownership is a kind of company insurance against labor troubles. A rapidly developing field of investment has realized the advantage of widespread public ownership of its stocks, and we have the intensive sales campaign of the public utilities. It has been said that there are in the United States today eight million stockholders of public utility companies.

The extent of popular participation in stock ownership is greater than is generally realized. It is estimated that there are seventeen million persons in this group.[1] The acquisition of stock

[1] *Recent Economic Changes, the President's Conference on Unemployment*, vol. I, pp. xii. This estimate may seem high to some; however, the point is that the number of stockholders has greatly increased, and not precisely how many such stockholders there are.

by so large a number of people cannot be without considerable social and political consequences, and it is with the effect of the unprecedented number of people in this group on the anti-trust laws that this paper is chiefly concerned.

What is the effect of such a diffusion of ownership on the anti-trust laws? The new army of stockholders is a sizable constituency. It is true that these seventeen million persons have no direct voice in future anti-trust legislation. But they are a factor to be reckoned with in any future law-making on this subject. They were not present when the anti-trust laws were enacted, but they will be on hand when they are revised. Furthermore, they are growing in numbers at an amazing rate. It seems safe to say that the day of prohibitory trust legislation has passed.

CURRENT PROPOSALS OF REVISION

Proposals to amend the anti-trust laws, in order to bring them into harmony with the trend toward consolidation, come from a variety of sources. All proposals require an alteration of the substance of the anti-trust laws, or else the procedure of enforcement, or both. Some of the most recent include:

1. *Codification.* At the Institute of Politics at Williamstown last summer, Mr. B. M. Webster suggested that all the present anti-trust laws be gathered into one coherent body of legislation and clarified. This proposal would unite, into a single law, the laws of 1890, 1914, 1918, 1922, and such others as may be deemed advisable. As the number of laws of this type is increasing, it would be necessary to do this much, at least. Mr. Webster pointed out that the necessity for this was already present.

2. *Regulation by Commission.* In a recent radio address,[2] Mr. Samuel Untermyer urged that the theory of prohibiting combinations is now impractical and expensive. He proposed that the Federal Trade Commission be given broader powers to regulate and supervise both foreign and interstate corporations. This would require the repeal of the Sherman Act, and possibly other acts. Powers of prosecution would be transferred from the Department of Justice to the Commission. He suggested, in effect, that the regulation of business combinations be patterned after the regulation of railroads by the Interstate Commerce Commission.

The American Bar Association is drafting a bill, although none appears to have been drawn up as yet. Its Commerce Committee has had meetings on the matter. The Chairman of this Committee suggests[3] that a law be constructed so as to: (1) retain the present anti-trust laws; (2) authorize the Federal Trade Commission (and other existing administrative bodies) to rule on requests to combine; (3) suspend the criminal provisions of the Sherman Act from the time of request to the Trade Commission to the time of the final court decision; and (4) continue as unlawful all combinations at present considered unlawful.

Another interesting suggestion is that of Mr. B. A. Javits in *The New Republic*, April 11, 1928. Mr. Javits, apparently speaking of the Petroleum Institute, urged that trusts be permitted, if in the public interest. He also stated that all profits above an eight percent return on the investment should be taxed fifty percent in return for this permission. He had some difficulty, however, in defining "public interest."

In a later issue of the same review, July 18, 1928, Mr. Copal Mintz, referring to Mr. Javits' proposal, made a more comprehensive suggestion. He advised, in effect, that a constructive law should: (1) compel wide distribution of stock ownership—the larger the combination, the wider the distribution; (2) set aside a substantial portion of stock for employees to participate in the monopoly control; (3) limit salary of officers of the company; (4) tax all profits above an eight percent return to the extent of one-half; and (5) make officers of the company personally liable for mismanagement. Neither of the last two articles contains any recommendations as to a commission to carry out the plan, although they seem essential, and may be implied, at least in Mr. Mintz's case.

3. *Regulation by an Industrial Court.* A recent address[4] before the Pennsylvania Bar Association by Mr. Donovan proposed an "advisory" court instead of the administration by a commission as suggested by Mr. Untermyer. Mr. Donovan proposed to: (1) retain the present anti-trust laws, with some modification; (2) establish an Industrial Court, with judges, to "advise" as to the legality of proposed mergers in interstate commerce; (3) confer immunity from criminal provisions of the Sherman Act by a favorable decision of this court; and (4) invest the court with power to form a plan of reorganization of mergers dissolved by the United States Supreme Court.

4. *Repeal.* There are some who advocate repeal of the anti-trust laws. Mr. Matthew Woll, Vice-President of the American Federation of Labor, is one of these. Labor was instrumental in passing the Sherman Act in 1890. Mr. Woll admits this, and frankly says that since labor has come under the equity power of the courts under that Act, it desires the Law repealed. Mr. Woll suggests uniform and public accounting[5] as a means of control.

The above, then, constitutes a brief résumé of the current proposals on the revision of the anti-trust laws. The amount of space here allotted unfortunately does not permit a more extended discussion of these views. Any readers who desire to pursue any of these proposals further may do so by referring to the sources given above.

It is clear, therefore, that should any revision be attempted by Congress, the seventeen million stockholders would be sufficiently well represented there to prevent any bill so drastic and prohibitory as the Sherman Act from becoming a law. Of course, such influence is indirect rather than direct. It is the influence of public opinion and of sentiment in stockholding sections of the country.

Popular *control* of corporations is an entirely different matter. It has been said that twenty percent of the stock of a company will control the policy of the company. It has been pointed out that ordinary persons as stockholders often hold non-voting stock, and that stockholders, in general, have no means of organizing so many scattered units. Finally, if a stockholder disapproves of a company policy, it has been urged that he sell the stock and buy another, rather than vote the stock in disapproval. It is unnecessary to question these assertions. Popular control of industry through stock ownership is one thing; the effect of this new army of stockholders on the anti-trust laws, is another. Whatever he sells, does not a stockholder really remain in the picture? Is there not a purchaser, a new owner, to take the place of the old one in every sale? This being so, and the army of stockholders being on the

[2] See *New York Times*, September 22, 1929.

[3] See Mr. Butler's article in this vol.

[4] See Mr. Donovan's article in this vol.

[5] *Current History*, October, 1926; see Mr. Woll's article in this vol.

increase, must we not acknowledge their influence on legislation?

PROPOSED LEGISLATION AND THE PRESENT LAWS

If the advocates of either repeal or modification of the anti-trust laws undertake to alter the existing statutes, there are at least three of these which will require their consideration. The first is the Sherman Act of 1890. This Law prohibited monopolies and combinations which restrain trade among the several states. Its enforcement was intended to rest chiefly with the Department of Justice. The Federal Trade Commission Act of 1914 was aimed at unfair trade practices and its enforcement was entrusted to a commission. The Clayton Act of 1914 was, in part, an effort to put enforcement of the Anti-Trust Law into the hands of injured persons by making it easier for them to sue combinations. Any new legislation must deal with these three laws, at least. It must deal with the problem of whether it is still desirable to retain this tripartite enforcement, to revise this present method, or to substitute a better plan. It must also decide the question whether it is better public policy to permit interstate combinations which restrain trade, and to regulate them as the Interstate Commerce Commission regulates the railroads, or to continue the prohibition which seems to be a farce in some businesses and an almost intolerable handicap in others.

Revision of the anti-trust laws should differentiate between three types of businesses in order to establish rules suitable for each. The railroads are already a well established group, and the current notion that they present characteristics peculiarly their own seems well founded. A second group, unlike any other kind of business, consists of corporations of a public utility type. Interstate corporations dealing in necessities like heat, light and power have inherent difficulties which seem to warrant separate regulation. There are about twenty-two thousand corporations in the third group. They are ordinary business corporations, not railroads or public utilities. The revision of the laws affecting these three groups should adjust its provisions to the different purposes for which these groups of merged businesses are to be regulated. In regard to railroads and public utilities, it has been frequently essential to sacrifice the competitive theory to public convenience. As ordinary business merges, it is becoming apparent that the cost of requiring competition in some businesses is already creating the problem of whether or not it can be continued. No one would suggest that two railroad lines should be forced to compete in the manner that ordinary business competes. Should a business, merged to the point that the meat packing business has been, be forced to compete? Or, should we gain more if we permitted them to merge, and then regulate prices as we now regulate railroad fares? It is the changing investments that have made this problem acute. The new methods of financing such companies on a large scale, through the issuance of new securities and stock dividends, are changing the character of the business. Must not the character of the regulation be altered in order to cope with this new situation? The present laws were designed for an industrial period fast disappearing. Should they not pass into history with that period?

THE LOBBY

It is certain that any revision of the anti-trust laws will encounter the lobby. A business which telegraphs congressmen through its stockholders,

writes school books and supports college courses, would hardly be expected to be inactive during a revision of legislation affecting it so vitally.[6] The difficulty is not that a group is represented by a lobby. The trouble is that a lobby, strong in Washington, may be influential entirely out of proportion to the opinion of the rest of the country. We must expect business to take an interest in legislation affecting it. It is regrettable that the ordinary citizen does not take a greater interest. One cannot imagine the kind of legislation we should have if no one took any interest. All that can be desired is that such interests be where the public eye can view them, and not under the table or in a school book. Legislation has been subject to the lobby ever since the organization of government. Certainly we do not expect to get along without it today. The tendency of corporations to inform their stockholders of pending bills seems to be a growing one. Circular letters dealing with legislation are part of the stockholders' mail, and if the number of stockholders continues to grow, this may have genuine educational value for all concerned.

SOURCES OF APPROVAL

It has been suggested—and with some degree of reason—that merging has already met with approval from unexpected sources. In so far as it restrains commerce among the states, it is plainly unlawful except as to railroads. Many businesses are educating their stockholders through the mail as to the advisability of merging with rival or allied companies. As we have already seen, there are seventeen million of these stockholders. They represent one source from which some approval of mergers can be expected. This new factor in our changing investments, this growing army, will not only influence any proposed law, but will also influence the enforcement of the present one.

Various acts of Congress have approved combinations in certain businesses—and for special reasons. The Webb Act of 1918 permits combinations in foreign trade. The Railway Act of 1920 permits railroad consolidation, with the approval of the Interstate Commerce Commission. The Agricultural Law of 1922 allows combinations of farmers and dairymen in interstate commerce, subject to the regulation of the Department of Agriculture if they unduly enhance prices.

Organized labor has gone on record as strongly favoring a repeal of the anti-trust laws. It denounced the Sherman Act at the convention of the American Federation of Labor, at Portland, Oregon, in 1923. It was one of the strongest advocates of an anti-trust law in 1890.

The Supreme Court has approved coöperative group action which does not restrain trade among the several states. In the Maple Flooring case,[7] it approved an association in interstate commerce which met and exchanged information on output and prices. It was shown in this case that the association did not take concerted action to fix prices. The case was a close one (three justices dissenting), and therefore does not remove the uncertainty as to future cases of this type. It may be taken as indicating the general change of opinion in the direction of a more intelligent attitude toward associations involved in the Sherman Act. That the court, labor and Congress should all show evidence of a more reasonable attitude toward combinations is indicative of how generally

[6] See Logan, E. B., "Lobbying," Supplement to vol. 144 of *The Annals*, July, 1929, p. 31.

[7] 268 U. S. 563 (1925).

accepted the fact has become that some change is required.

In conclusion, the writer submits that due to the decrease in real estate ownership and the increase of investments in stocks and bonds by all classes of people there exists a condition for which the Sherman Act is an inadequate answer. These investment changes have brought new factors for consideration in the trust problem. The confidence of the investor has replaced the fear of monopoly. Proposals to alter the anti-trust laws recognize this. Various groups—organized labor, Congress and the courts—have indicated a more intelligent attitude toward the merger, a present-day economic asset. It remains to incorporate this new economic policy into legislation which will restrict mergers only so far as the public interest may require.

The Effects of the Administration of the Anti-Trust Laws Upon Labor and Services

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I HAVE been asked to deal with the effects of the administration of the anti-trust laws on labor and services. What part of the prosperity or profit of the producer is passed on to labor, the distributor and the consumer? Is the division equitable or inequitable? What is the undercurrent—content or discontent?

I should hesitate—in fact, refuse—to express views or a conclusion on a subject so vital to the prosperity of our nation if it were not for contacts that I have had during the past twelve years as a member of the Executive Council of the National Civic Federation, an organization created by Mark Hanna and Samuel Gompers to discuss and attempt to mediate conflicts between labor and capital, and during the past two years as a member of its Commission on Industrial Inquiry.

It should be understood that the picture I have attempted to paint and the conclusions drawn therefrom are not to be understood as those of the committees on which I have served, and am serving.

I shall consider the legal aspects only in so far as they have a bearing on the human aspects. No one will seriously question that government is an art, not a science; that its true purpose is to reconcile individual liberty with an orderly progress of society; that the cause of most wars has been largely due to commercial rivalry; and that class or civil warfare has as its basis discontent growing out of economic and industrial disturbances. Therefore, if the administration of our anti-trust laws is not in the interest of labor and services, and not functioning for the general good, if our form of democracy is to prosper and continue, the defects in these laws and the administration thereof must be remedied.

NATIONAL CIVIC FEDERATION INQUIRY

At the twenty-seventh annual meeting of the National Civic Federation, held in December, 1927, Mr. Matthew Woll, then and now President of the Federation and Vice-President of the American Federation of Labor, stated the problem facing business and labor due to the administration of the anti-trust laws, and closed his address as follows:

> The interpretation of the anti-trust laws, coupled with the growing equity power of our courts, presents problems and ultimate consequences that should demand the attention of all serious-minded and unbiased persons. These problems can no longer be lightly regarded, nor be dismissed by a prejudiced or partisan justification or condemnation.

It was unanimously decided to make a study of three related questions, the cause of much bitterness between the two great forces—capital and labor—these questions being:

(1) Should our anti-combination and anti-monopoly policies be modified or abandoned to permit better industrial organization and more efficient production?

(2) Is there need for the abolition or modification of the use of the injunction in industrial disputes?

(3) Are promises required of work-

men, obligating them not to join a union (the "yellow dog" contracts), a proper part of modern work contracts?

What are the scope, purpose and effects of the company union movement, and what is its relation to, and effect upon, standard trade unions?

To carry out this study seventy representative men of business and of the legal profession, educators, scientists, manufacturers, chain store executives, trade association directors and labor leaders, accepted membership on the Commission on Industrial Inquiry. From the personnel of this Commission there was appointed a Committee on Plan and Scope, the questions to be studied by three separate committees. It was sought to make these committees representative of every view, as well as of organized business and labor. No report has been made by these committees to the Commission.

As Chairman of the Committee on Study of Anti-Trust Legislation, I have attended numerous meetings and conferences at which the human, as well as the legal, aspects have been discussed. Due to the untiring and patriotic efforts of Arthur E. Foote, Director of Study, and to the analysis that he has made of the documents, papers and pamphlets filed with the Committee, including replies made in response to questionnaires from lawyers, bankers, economists, philosophers and trade associations; due to the helpful coöperation of the late Dr. Jeremiah W. Jenks (one of America's great economists); due to the knowledge and experience of other members of the Committee, including Rush Butler, Chairman of the Commerce Committee of the American Bar Association, J. Harvey Williams, of Buffalo, who is recognized as expressing the view of the smaller industrial units; and due to the contacts at meetings with the chairmen of the other divisions and with representatives of organized labor, we have gained some understanding, not only of the vital importance, but of the complexity of the problem.

Early Conclusion

At the outset of the inquiry, broadly and briefly stated, the conclusion was reached that *every price, no matter how reasonable, if fixed in combination,*[1] *and every strike, no matter how peaceful, if it interfered with commodities in interstate commerce,*[2] *is unlawful.* In consequence of these and other similar decisions, in every industrial center of the United States leaders of organized labor and (or) business, separately, are frequently in secret conference discussing how industry may function without being in contempt of court due to injunctions granted, pending, threatened or anticipated.

If the injunctions now in force, and those which should be granted if sought, applicable to business and (or) labor, and punishments for the contempt thereof, were enforced, there would be no accommodations in the jails. The Federal Government would have to establish a chain store system of jail barracks. It is also quite evident that the ruthless elements—fortunately they are not in control—both in business and labor, would welcome this condition. They want a fight to a finish. Their purpose is to discredit the courts in the eyes of the people. In consequence of these conditions organized labor, as well as organized business, is seriously threatened, for the ruthless minority element in both is seeking ascendency, and conditions may arise which would give it control in the event business and (or) labor attempt to function under the anti-trust laws as now interpreted. These ruthless leaders would defy the courts and would call upon them to go the limit in enforcing injunctions.

[1] *Trenton Potteries case,* 273 U. S. 392.
[2] *Bedford Stone case,* 274 U. S. 37.

To those who have not been immersed in a study of this subject, the gravity of the situation, as I have depicted it, will be viewed as grossly and unwarrantably exaggerated.

The great prosperity which the country has enjoyed for the past six or seven years has been reflected (until very recently) not only in the stock market, but in the attitude of the Department of Justice. It is quite evident from the data that have come to the attention of this Committee that the anti-trust laws, as interpreted by the Supreme Court of the United States, were generally considered by both business and labor organizations a dead letter, and, like the Blue Laws, would no longer be enforced.

In the course of the study and investigation undertaken by this Committee, certain plans, business programs and codes of ethics adopted by various industries, either through trade associations or trade institutes, were brought to our attention. It was represented that at least some of these plans and programs apparently had the sanction of the Department of Justice, and it appeared that some of the codes of ethics had been adopted at trade conferences held under the auspices of the Federal Trade Commission.

It was the view of many of the members of the Committee that if these plans, programs and codes of ethics were legally enforceable, and not in violation of the anti-trust laws, there was probably no urgent reason, from the standpoint of business, at least as applicable to the small industrial unit, for any amendments to the Anti-Trust Law.

There was concretely presented, for the attention of the Department of Justice, the procedure as we understood the facts to be in connection with the plans and programs to which I have made reference, and also the codes of ethics adopted by various industries; and we sought to get an expression from the Attorney General of the present Administration as to whether or not they violated the provisions of the Anti-Trust Law. I interpret the address of Hon. William D. Mitchell, the Attorney General of the United States, delivered at the annual meeting of the American Bar Association at Memphis, October 25, 1929, as a pronouncement that the Anti-Trust Law will be enforced as to business and (or) labor organizations. In brief, he says:

> Our material prosperity has been so overwhelming, our business institutions have been increasing in size and number with such leaps and bounds, *I feel there has been a disposition here and there to go too far and transgress the law.* . . .
>
> The Department's program of law enforcement *does not make any exception of the anti-trust laws.* . . . *It will be the duty of the Attorney General to enforce those laws, and we shall undertake to do this without prejudice and with fairness, but with firmness.*

There is no question that the pronouncement of the Attorney General, who is bound by his oath of office to administer and enforce the laws, is sound and unanswerable.

Position of Organized Labor

In connection with, and in contrast to, the pronouncement by the Department of Justice, we must consider an editorial which recently appeared in the newspapers owned by the Scripps-Howard Syndicate. It probably reached fifteen million people. It is entitled, "Where is the American Federation of Labor?" Some of the high spots follow:

> To anyone interested in the rights and welfare of the workers, the American Federation of Labor . . . is a somewhat pathetic organization. It has to report:

(a) A labor awakening in the south, in which it has little share; and industrial warfare in the south, which it has done little to mitigate.

(b) Basic industries, such as steel, automobiles, rubber, oil, in which labor has neither organization nor collective bargaining.

(c) Other basic industries, such as coal and textiles, in which chaotic conditions drift from bad to worse, with the Federation having no constructive program to prevent increasing suffering in those trades.

(d) Growth of the anti-labor injunction evil handcuffing the unions, and its helplessness to protect the constitutional civil rights of the workers. . . .

Certainly government and industry are jointly responsible *when the Secretary of Labor must admit that "there are among us from ten to twenty million people who do not share as they should in the prosperity enjoyed by the rest of us."* Certainly government and industry are jointly responsible for the legal and physical terrorism which victimizes workers and their unions. . . .

If the American Federation of Labor cannot get justice for labor in Congress, in the courts, and in industry, who can? . . .

In conclusion, "The American Federation of Labor is accurately described as the aristocracy of labor. All aristocracies are subject to dry rot."

Mr. Matthew Woll has sent me a copy of his article, which will appear with this symposium. If the anti-trust laws are enforced as against labor, the great labor group in the United States will endorse his conclusion:

> Our workmen have become conspirators in a land of men who boast before the world their freedom. The Great Guaranties have been replaced with a court-made catalogue of "shalt nots" that go beyond the dreams of kings and transcend the power of emperors.

The symposium of views given in the *American Labor Legislation Review* of September, 1928, clearly discloses what is set forth in great detail from all agencies throughout the United States in the reply to the questionnaire of the Civic Federation. The pronouncements on the anti-trust laws in this symposium are:

From the standpoint of the League for Industrial Rights: "It is a bulwark of freedom."

From the standpoint of the New School for Social Research: "It is a menace to freedom."

From the standpoint of organized labor, the charge is made that there is "the double standard in applying the Sherman Act."

From the standpoint of the legal profession: "Make the laws more explicit."

From the standpoint of the legislative expert: "The labor injunction—a red flag."

From the standpoint of the economist: "The Sherman Act is a necessary evil."

Continental and British jurisprudence approach the matter of combination with the dominant idea that the whole public is to be safeguarded. American jurisprudence looks *only to the consumer*. Our anti-trust laws forbid coöperation among competitors, regardless of the good results and the good purposes which may have inspired such coöperation.

"PROFITLESS PROSPERITY"

The evidence before the Committee would seem to clearly indicate that during the past few years a great volume of business has been transacted in the United States, and that apart from the corporations of huge and dominating magnitude a majority of the average producing and distributing corporations have been conducted on a basis aptly described as "profitless prosperity."

J. Harvey Williams has most graphically depicted this situation in articles in the *Atlantic Monthly* of March and June, 1928. A trade association secretary of Chicago pithily and briefly described the situation as follows:

> One cannot now run business as in 1890—forty years ago—since the arrival of the wireless, automobiles, the radio, aerial transit, and so on; still the Government tells business it must be regulated and run as it was in the past. The answer is trusts, combinations, mergers, chain stores, and so forth, among which the ordinary citizen is ground as between millstones by the powerful purchasing agencies and is forced to give up. Middle-sized merchants and home owners are what build a community and make a neighborhood, not rubber-stamp employees.

Ex-Senator James Hamilton Lewis has been making addresses throughout the United States before bar and trade associations in which, in effect, he charges that business competition and national prosperity are receiving death blows in mad mergers of money and concentration of commerce; that the United States has fewer national industries than we had before the war, and fewer banks. This means less money for small business and more money for merged monopoly. He warns, as I find many other publicists are doing, that if the people remain silent in the hopes of benefit because of the pretense that the fewer institutions the less the expense, and, therefore, the lower will be the cost of everything, they will awake to find themselves caught in the stockade; that, if they do not oppose this trend, they will bring upon this nation either an era of despotism of masters or an uprising of radicalism and communism that will destroy honest property, overturn just credit, terrorize true capital and frighten honest industry from every undertaking, and bring upon the land a panic of terror and desolation.

It is quite evident to me that, in spite of the apparent bountiful prosperity throughout the United States, there is an undercurrent of discontent extending not only to labor and the distributor, but to the owners of the smaller industrial producing units.

I would not want to be understood as saying that the survey that has been made by the Committee is sufficiently complete or comprehensive on which to base a conclusion as to whether monopolies or so-called trusts are passing an equitable proportion of the savings growing out of mass production to the consumer, in the form of lower prices or to the laborer in the form of higher wages; but I interpret the evidence before the Committee as justifying the conclusion that there is discontent and dissatisfaction, and that, therefore, the Harvey Williamses, the J. Hamilton Lewises and the Scripps-Howards reflect the views and voice the sentiments of millions of people in the United States in every section and from every group.

CATALOGUE OF CONTENDING PARTIES

If the anti-trust laws are enforced, as they should be enforced, so long as they are statutes, the contending parties in the field of production, in organized business and labor, and in the field of distribution, can justly be catalogued about as follows:

(1) The conservative leaders—present spokesmen of organized labor—who want to live within the law and who advise the unions with which they are affiliated to function under the laws as interpreted and applied by the Supreme Court of the United States.

(2) Those advocating the *One Big Union* to include all trades. To them, every dispute should mean a general strike, with leaders who glory in defying the courts and who would make the struggle between the employer and the employee a war to the death. They scoff at and ridicule

those now guiding organized labor as the "kept agents" of organized business.

(3) The executives of the average corporation trying to meet the competition of many others in the same field, seeking to function within the law, and torn between conflicting emotions and diverse advice. Shall we discuss prices? If so, how and under what conditions? They are seeking to know what is condemned and what commended, and are trying to ascertain what is the true interpretation to be given to the last decision of the Supreme Court of the United States.

(4) Chairmen of the boards of corporations controlling the production of fifty percent, or a trifle more or less, of some basic commodity, commonly known as the "good trusts," operating under some decision, holding that their restraint of trade is reasonable, or that they are entitled to a monopoly through ownership of valid patents.

These men are not entirely happy. They must keep their competitors satisfied, which means permitting them to fill their factories with profitable business. They live in the constant fear of a change in the policies of the Department of Justice, which may result in new proceedings and decisions, putting them in the class of "bad trusts."

(5) In the field of distribution there has grown up in recent years a titanic struggle between the wholesaler, jobber, commission merchant and retailer, on the one hand, and the chain store organizations, on the other. This battle of giants, to reach and hold the trade of the consumer, bids fair to be more intense and more bitter than that existing between the groups of organized business and labor in the field of production.

These staggering problems of industry, plus the enforcement of prohibition, fall almost exclusively on the courts. In consequence, on the heads of the Federal judiciary, in particular, is and will be heaped, largely in secret, the abuse of all these groups.

The enforcement of the anti-trust laws should, and will, *tend to clarify immediately what would otherwise become an intolerable situation;* that enforcement based only upon the "consumer's philosophy" will be swept away. All interests should realize that it is most fortunate that the gravity of the situation is being brought to the attention of the public through the executives of organized labor; that they have done so in a masterly, conservative and dignified manner; and that they are seeking to avoid sensationalism or an appeal to the passions or the prejudice of any group.

Thanks to our immigration laws, the interests of labor and of business are, and should be, treated as identical. There should be no double standard in the enforcement of the anti-trust laws. In consequence, the ruthless leaders in business will have to bow to the views of the conservative group, which is not only in the ascendency, but constitutes the great majority, and the ruthless leaders of labor will be unable to prove the charges against the present leaders of labor made in the Scripps-Howard editorial.

We are fortunate in having as the Secretary of Commerce a worthy successor to President Hoover, equipped by experience and temperament to be of great assistance in bringing together the contending parties in industry in an effort to reach an agreement upon remedial legislation, which will certainly, no matter how inadequate, tend to avoid in a great measure the conflict between these warring interests in industry. Our anti-trust laws must provide for the protection of all the people—producer, laborer, distributor and consumer.

Some Reciprocal Effects of Our Anti-Trust Laws, with Special Reference to Australia

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WE shall confine the treatment of this subject to a discussion of the influence of American anti-trust legislation upon legislation in Australia since the establishment of the Commonwealth (1901) and upon the recent methods adopted in some other countries for controlling monopoly. It will be necessary to distinguish between the attitude of public opinion in the early period of anti-trust legislation, ending about 1913, and in the later period. In the early history of the Australian Commonwealth the existence of combinations in certain industries, notably sugar, shipping and coal, attracted public attention and the democratic nature of the Parliament of the Commonwealth led to an early attempt at prohibitive legislation. This was embodied in the Australian Industries Preservation Act, 1906–1910. Under the Commonwealth Constitution, Parliament can pass legislation with respect to foreign and interstate trade, but not with respect to trade within a state. In the original Act, sections five and eight prohibited "any foreign corporation or trade or financial corporation" from entering into any contract in restraint of trade or controlling to the detriment of the public the supply or price of any service, merchandise or commodity "within the Commonwealth." These sections were held by the High Court to be invalid in *Huddart Parker & Co. Pty. Ltd.* v. *Moorhead*,[1] because they did not fall within the provisions of the Constitution, which confine the legislative powers of the Commonwealth in this connection to foreign and interstate trade. They were repealed in 1909. A review of the development of trusts in Australia in 1914 showed that the majority of trade combinations did not extend beyond the limits of a state; consequently, the anti-trust legislation was limited in its application.[2]

THE COMMERCIAL TRUST

The Act itself prohibited any person from making a contract or engaging in a combination in relation to trade or commerce with other countries or among the states, if such action were in restraint of trade. An important feature was the provision that if a defendant was a "commercial trust," this in itself was evidence of combination. A commercial trust is defined in the Act as including a combination

> whether wholly or partly within or beyond Australia, of separate and independent persons (corporate or unincorporate), whose voting power or determinations are controlled or controllable by:
>
> (a) The creation of a trust as understood in equity, or a corporation, wherein the trustees or corporation hold the interests,

[1] 8 C. L. R. 330 (1908).
[2] Wilkinson, *The Trust Movement in Australia* (Melbourne: Critchley Parker, 1914).

shares or stock of the constituent persons; or

(b) An agreement; or

(c) The creation of a board of management or its equivalent; or

(d) Some similar means;

and includes any division, part, constituent person or agent of a commercial trust.

It is clear from the debates in Parliament that Australian legislation was very greatly influenced by the Sherman Act. Thus, Sir William Lyne, Minister for Trade and Customs, in moving the second reading of the Bill, made the following statement at the outset of his speech:

This Bill aims at preventing monopolies. If such a measure had been enacted in the United States early in the history of that country, there would not be the huge monopolies which exist there today. It is well, therefore, that we should deal with this matter at an early stage in our national life, because the Commonwealth is destined to make very rapid strides. If honorable members have taken the trouble to read the attempts which have recently been made to cope with certain monopolies in the United States, they must admit that it would be a sorry thing indeed if similar monopolies were created in Australia.

He then proceeded to compare certain provisions in the Bill with similar provisions in the Sherman Act, and further remarked that

honorable members will see that there is very strong legislation in the United States and the clauses I have just read are adopted from that legislation.[3]

COMPARISON OF SHERMAN AND AUSTRALIAN LAWS

An important distinction was made by Mr. Isaac Isaacs, then Attorney General, between the Australian Act and the Sherman Act in the following words:

Honorable members will see from these cases that the American law devotes itself entirely to the question of whether there is a restraint of trade without regard to the fact that it is beneficial or injurious. This Bill will, I think, be seen to be framed with greater care to meet what I think to be the justice of the position, as, unless the restraint is to the detriment of the public or injurious to industries which ought to be preserved, there is no penalty at all. But if there is a restraint of trade to the detriment of the public, or if there is an intention to destroy Australian industries whose existence is shown to be beneficial to Australian producers, consumers and workers alike, there is a breach of the Act.[4]

This point of view was emphasized in an important addition to the Act in 1910, providing that it would be a defense to a proceeding for an offense under the Act that the alleged restraint of trade was not "to the detriment of the public" and was not "unreasonable."[5]

The enthusiasm for the American legislation shown by the sponsors of the Bill and by the Labor Party was not shared by members of the Opposition. On this point, the following statement made by an opponent of the Bill during the debate is of interest:

All we know with regard to the second part of the Bill is that it is based on the Sherman Act of the United States. To those who wish to see anti-trust legislation made effective, that fact does not convey very much comfort, because we know that the Sherman Act has absolutely failed to accomplish the object for which it was designed. When the Act was introduced into the United States in 1890 trusts and combinations were in their infancy. Now, after the Act has been in force for sixteen years, they are in full operation, and have become a by-word throughout the civilized world. All that we know at present is that the Act upon which this measure has been framed has proved a failure.[6]

Other British Dominions passed similar legislation at about the same time. In New Zealand, the Commercial Trusts Act (1910) was designed to repress monopolies. The Combines Investigation Act (chapter IX, 1910) of Canada made provision for an investigation into the operation of monopolies and for subsequent legal proceedings against persons proved to be engaged in monopoly control. In the Union of South Africa, under the Post Office Administration and Shipping Combinations Discouragement Act (1911), the Governor General was empowered to discriminate with respect to mail contracts and regulations regarding docks and railway freights against persons connected with shipping or other combinations deemed detrimental to South African trade or industries. The Australian legislation is, however, wider in its scope and was intended to be more definitely repressive than the legislation of the other Dominions mentioned. This may be due, in part, to the fact that in the early years of federation both Parliament and the High Court were considerably influenced by American precedent in regard to Federal legislation and Federal powers.

PROPOSED AMENDMENTS TO CONSTITUTION

In the few cases which have gone to the courts under the Industries Preservation Act, the chief obstacle to securing a conviction rested in the court's interpretation of the degree to which a restraint of trade was against the public interests. On appeal, the higher courts invariably held that a restraint of trade of this nature had not been proved. Thus, in *Adelaide S.S. Co.* v. *The King*,[7] it was held by the Full Court of the High Court of Australia

that the agreement between the proprietors and the ship owners was not, on its face, made with intent to restrain trade and commerce to the detriment of the public.

To overcome these and other difficulties in rendering the legislation effective, efforts were made, originally in 1911, and on three subsequent occasions in a modified form, to increase the powers of the Commonwealth by amending the Constitution. On the first two occasions (1911 and 1913), the problem of monopoly occupied an important place in the proposed amendment, but in 1919 and 1926, though the amendments would have given the necessary powers they were not advocated primarily for this purpose. The amendment of 1911 proposed the following addition to the Constitution:

Where each House of Parliament, in the same session, has by resolution declared that the industry or business of producing, manufacturing or supplying goods, or of supplying any specified services, is the subject of any monopoly, the Parliament shall have power to make laws for carrying on the industry or business by or under the control of the Commonwealth, and acquiring for that purpose on just terms any property used in connection with the industry or business on just terms.

On this occasion, as on subsequent occasions, the increased powers were refused at a referendum. The early experience of prosecutions under the Act was an important cause, and the refusal of the people to grant increased powers to the Commonwealth was a significant indication of a reversal of public opinion regarding the efficacy of legislative control of monopolies.

[3] *Parliamentary Debates* (Commonwealth), vol. 31, pp. 243–47.

[4] *Ibid.*, p. 380.

[5] It must be understood that the opinions expressed by Mr. Isaacs were based on the interpretation of the Sherman Act then current in the United States and subsequently rejected in the cases of *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. A. (1911), and *United States* v. *American Tobacco Co.*, 221 U. S. A. 106 (1911).

[6] *Parliamentary Debates* (Commonwealth), vol. 31, p. 489.

[7] 15 C. L. R. 65 (1912).

It is no exaggeration to say that the Act remains largely a dead letter and is now claimed to be detrimental to the development of "rationalization" in at least one important Australian industry. As a result of a conference of overseas ship owners and representatives of the importing and exporting industries of Australia, the Australian Overseas Transport Association was formed, in 1928, for the purpose of effecting economies in overseas transport. The important question has now arisen whether an agreement made between shippers and ship owners is permissible under the Act. At the time the Act was passed it was popularly assumed that such an agreement would be detrimental to the public interests, and according to the statement of the Overseas Transport Association it will be necessary to secure an amendment to the Act before an agreement can be effectual.

SHERMAN LAW INAPPLICABLE ABROAD

In the United States a change in the method of controlling monopoly was made by the creation of the Federal Trade Commission, in 1914, and the passage of the Webb-Pomerene Act, in 1918, also indicated a significant change in the attitude of public opinion toward the problem of monopoly. Before proceeding to examine the effects of the Webb-Pomerene Act upon legislation in Australia and other countries it will be desirable to summarize the relation of the anti-trust legislation to the American export trade. In this connection, it is first essential to point out that the legislation has no extraterritorial effect. That acts done in foreign countries do not fall within the scope of the Sherman Act was clearly established in 1909 in the case of *American Banana Co.* v. *United Fruit Co.*[8] This case was decided on the general rule that the character of an act as lawful or unlawful must be decided wholly by the law of the country where it is done. It was, therefore, possible for a United States company to act in restraint of trade against a competitor in a foreign country, provided the act was done in that country. On the other hand, however, under the Sherman Act it was not permissible for an American company to perform any act in the United States creating a restraint of trade abroad. This was established in 1913 in the case of *United States* v. *Pacific and Arctic, etc., Co.*[9] With regard to foreign companies operating in the United States, it was declared in 1911 in the case of *United States* v. *American Tobacco Co.*,[10] and in other cases, that acts done by such companies in the United States fall within the scope of the legislation.

These cases indicate that up to the passage of the Webb-Pomerene Act the anti-trust legislation operated with at least equal severity upon United States and foreign companies carrying on business in the United States. The new legislation must be looked upon as an indication that the United States was being swept into the vortex of competition for the foreign markets of the world. That the export trade of the United States was destined to make great advances was evident to competent observers before the War. With the demand for War materials and foodstuffs this expansion came more rapidly than was anticipated. In some industries exporting semi-manufactured or finished goods the trade was in the hands of great amalgamations, such as the United States Steel Corporation, the International Harvester Company and the National Cash Register Company. These companies were able to compete effectively with foreign companies and did not require special exemption from the anti-trust legislation. It was with respect to competing companies desirous of increasing their sales in foreign markets that the anti-trust legislation was deemed to operate harshly. When these facts were emphasized by the newly established Federal Trade Commission their significance was readily appreciated by the public, and the Webb-Pomerene Act was the natural result.

To an outsider, however, the logic was not so irresistible. It mattered little that Germany had through the cartel movement practiced price discrimination in her export trade, that Great Britain was soon to make special provision for granting credit to exporters, or that primary producing countries like Australia sought to organize special associations for handling export surpluses of protected goods. The American legislation was looked upon as granting special favors to United States exporters in a deliberate effort to capture foreign markets. This naturally strengthened the feeling of nationalism usually associated with the export trade, and was also one of the factors leading to the rapid increase in tariffs throughout the world after the War.[11] The nationals of one country may claim that its legislation has proved an effective means of meeting foreign competition in outside markets. If this is so, its rivals will be only too ready to point to the special privileges enjoyed by the exporters of that country. Is there any justification for such a point of view regarding the American export trade? In exempting exporters from certain provisions of the anti-trust legislation, the United States Government merely allows them the same rights as exporters in most countries receive from their own governments.

The Webb Act was passed at a time when national sentiment had been deeply stirred by the War. In almost every country there was a campaign in favor of high tariffs against imports and special encouragement of exports. Many countries not only allowed, but deliberately fostered, practices in the export trade far more aggressive than those which the authors of the Webb Act had in mind. At the same time, this Act was looked upon by foreigners as a definite attempt on the part of the United States to secure an unfair advantage in foreign trade. It occupied a prominent place in the propaganda for higher tariffs. We may quote from *The Australian Tariff Handbook*, published in 1919 for the definite object of securing an increase in the tariff:

> The "Webb Act" says, in effect, to the manufacturers of America, "You shall not on any account attempt to exploit American citizens by trust methods, but you are at perfect liberty to prey to the extent of your capacity on foreigners." And in every manner possible it encourages the development of trusts and combines for that purpose. Overtly an Act to facilitate the development of America's export trade, it is in reality an Act to promote the capture by American manufacturers of the world's markets by associated dumping. Few of our readers will be surprised to hear that the National Association of Manufacturers—perhaps the most powerful industrial body in the United States of America—has taken the matter in hand, and is now actively organizing the various sections of American industry with a view to forming a mighty and connected group of exporting corporations.[12]

Such extravagant views were not

[8] 213 U. S. 347.

[9] 223 U. S. 87.

[10] 221 U. S. 106.

[11] On this point see Cassel, "Recent Monopolistic Tendencies in Industry and Trade," *International Economic Conference Documents*, p. 20.

[12] P. 16.

uncommon at the time, and they had considerable influence with governments forced by public opinion to grant further protection to local industries. Thus, in Australia, the Minister for Trade and Customs, in introducing the 1920 tariff which raised many duties, remarked:

> Quite recently the American Congress passed a law suspending all the anti-trust legislation so far as combination for export purposes is concerned, and enabling these great associations to exploit the foreign markets to any extent they desire in this particular direction.[13]

INFLUENCE OF LAW UPON EXPORT TRADE

After ten years' experience of the Webb Law, there is little doubt that these fears of a deliberate exploitation of foreign markets by associations formed under the Law were ill-founded. The influence of the Law upon the development of the export trade has been examined by Mr. William Notz in the *American Economic Review*, March, 1929. Though there were fifty-six associations representing eight hundred different concerns, and the total value of exports for which such associations were responsible had increased from 139.7 million dollars in 1924 to three hundred million dollars in 1927, the exports represent approximately six per cent only of the total American export trade. As far as Australia is concerned, little public attention is now paid to the effect of the Webb Law. On the contrary, frequent reference is made, in discussions on the tariff, to the alleged practice of the International Harvester Company of selling its goods on the Australian market at a lower price than obtains in New Zealand for the same goods. The reason given is that the existence in Australia of a tariff on farm machinery and of a strong implement manufacturing industry necessitates the lower price in this country. It is evident, therefore, that the competition of a company not requiring the facilities offered by the Webb Act is more important than the competition of the associations established under the Act. Whether this be so or not, the United States can fairly claim that its legislation did not allow combination in the export trade to operate so freely as had long been the practice of some other countries. There was, moreover, a wider appreciation in other countries of the advantages of combination. Thus, we find the British Committee on Industry and Trade in its Final Report (Cmd. 3283), published in 1929, declaring:

> We are convinced that leading manufacturers and their representative organizations in each of the more important export trades would do well to examine the position thoroughly and systematically with a view to determining whether any, and if so what form of, coöperative action for the purpose of marketing their goods in overseas markets would be suitable to the circumstances of their trade.[14]

In Australia important developments have taken place in recent years, in connection with the organization of the export trade in certain industries, notably sugar, butter and dried fruits. In each case it has been possible, either by legislative enactment or by agreement among the exporters and producers, to arrange for the selling of the product on a protected domestic market at a higher price than is available in the world markets. The higher local price is, therefore, to be regarded as a means of compensating producers for "losses" incurred in marketing their export surplus abroad.[15] This practice has proceeded much further than is possible under the Webb Act in the United States, but the passage of the McNary-Haugen Act may eventually lead to similar practices in the American export trade in primary products.

Up to the present, therefore, the provisions of the Webb Act are part of the general process of combination in the export trade which has become a feature of commercial organization in practically all countries, even primary producing countries. But there is a feature of the American legislation which is in the direct line of modern thought upon the problem of combination and its control. We refer to the clause of the Webb Act requiring every export association to file with the Federal Trade Commission a copy of its charter, by-laws and agreements, as well as the names of its officers and members, and to

> furnish to the Commission such information as the Commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships and individuals.

These provisions for placing export associations under governmental supervision have been rightly referred to by Mr. Notz "as a forward step in placing international commercial relations upon a higher plane." While the general prohibitions against combination embodied in the Sherman and the Clayton Acts find little expression in the legislation of other countries, the provisions for inquiry and publicity at the hands of the Federal Trade Commission are being applied to an increasing degree. We quote again from the Final Report of the British Committee on Industry and Trade:

> They [advocates of restraining legislation] practically all agree in putting publicity in the forefront, and some of them limit their recommendation to the enforcement of publicity which they believe would be an effective deterrent.[16]

The Committee largely endorsed this view:

> We think that the Board of Trade should include among its general duties the watching of the movement towards consolidation and agreement in industry, and the continuous collection of data with regard to various forms of combination.[17]

A similar view was expressed by the *Report of the Liberal Industrial Inquiry of Great Britain*.[18] In Australia tariff legislation has been greatly influenced by American practice and it is reasonable to suppose that certain provisions in the Tariff Board Act (1921) were in part inspired by the American practice of investigation and publicity. This Act empowers the Board to inquire into, and report upon, a complaint that a manufacturer is taking unfair advantage of the protection afforded him by charging unnecessarily high prices or acting in restraint of trade to the detriment of the public. The Tariff Board, in its last annual report, drew attention to its powers under this provision. Where a manufacturer is found on investigation to be taking undue advantage of the protection given by the tariff, the Board may recommend that the import duty be reduced or abolished. These provisions for investigating monopolistic development by the Tariff Board would seem to be now the most effective method of controlling monopoly in Australia.

CONCLUSIONS

Our general conclusions are:

(1) That in the early history of the

[13] *Parliamentary Debates* (Commonwealth), vol. 91, p. 714.

[14] Pp. 163–64.

[15] For a summary statement of the costs of this control of the Australian export trade, see *The Australian Tariff: An Economic Enquiry* (Melbourne: University Press, 1929).

[16] P. 189.

[17] P. 192.

[18] While agreeing that "the Trade Association

Commonwealth the anti-trust legislation in Australia was modeled upon the Sherman Act to a greater extent than similar legislation in other countries.

(2) That the legislation did not prove effective, first, because the Commonwealth had inadequate powers, and secondly, because the courts gave a liberal interpretation of the degree to which restraint of trade could be practiced without falling within the ambit of the legislation.

(3) That the general provisions for control of combinations exercised by the Federal Trade Commission are in keeping with recent legislation in Europe and with modern thought on the problem of monopoly control.

(4) That the Webb-Pomerene Act was at first accepted as a ground for additional tariff protection in some countries, but is no longer regarded as such.

(5) That the repressive legislation of the United States is not now accepted abroad as an effective means of controlling monopoly.

(6) On the other hand, the provisions for investigating combination by the Federal Trade Commission have been embodied in legislation in other countries, but it is impossible to state whether American practice has greatly influenced other countries in this respect.

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developed on sound lines may play an important part in improving the efficiency of private enterprise," the Report proposes that such an association should be subject to special rules concerning publicity and the preparation of statistics.

A Contrast Between the Anti-Trust Laws of Foreign Countries and of the United States

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THE extent and the importance, especially in the light of the recent important address delivered by the Attorney General of the United States before the American Bar Association, of the subject indicated by the title which has been selected for this paper, are such as to warrant a full treatise for its adequate presentation. It will, however, be here treated within the necessary limitations of a few pages. The result, it is hoped, will be sufficient to present an adequate basis or starting-point for a more complete study of the subject by those sufficiently interested.

THE EXISTING SITUATION

Throughout the period of nearly forty years, during which the Sherman Anti-Trust Law has been in existence, it has been the subject of widespread discussion and of a voluminous literature. In the excellent book[1] written by the present Chief Justice of the United States when he was Kent Professor of Law at Yale University, he said that the Sherman Law "is one of the most important statutes ever passed in this country." Similarly, Mr. Justice Clarke, a Justice of the Supreme Court, referring to a decision of that Court under the Sherman Law, said:

> This one case . . . illustrated the fact that the scope of the jurisdiction of the Supreme Court has become so fateful that the effects of many of its decisions upon the welfare of our country are as great as would be the results of decisive battles in a great war.

In the light of the industrial developments which have been taking place in this country during the past few years, and in the light of the state of excessive competition now existing in every truly competitive industry in this country—a condition which has been described as "profitless prosperity"—the correctness of the utterances thus quoted is fully confirmed.

During the past two decades at least the attention of economists and of legal writers has been directed—unfortunately to a quite insufficient extent—to the significant fact that, although the present system of anti-trust laws of the United States is concededly based on the common law of England, nevertheless that country and its two most progressive and forward-looking Dominions, Canada and Australia, have long since abandoned the ancient common law principles which formerly governed the subject, while the United States has retained these principles in all their age-old rigor, and has even extended their scope. In the Danbury Hatter's case,[2] the Supreme Court said that the Sherman Law "has a broader application than the prohibition of restraints of trade unlawful at common law."

Accordingly, it will be the purpose of this paper to show that, notwithstanding the fact that the basis of the anti-trust laws of this country, as well as of Great Britain, Australia and Canada, are precisely the same, namely, the

[1] Taft, William H. *The Anti-Trust Act and the Supreme Court* (Harper's, 1914).

[2] *Loewe* v. *Lawlor*, 208 U. S. 247.

ancient common law of England, nevertheless, these latter countries have wholly abandoned these ancient principles, whereas the United States still retains them in substantially their pristine vigor.

ORIGIN OF THE SHERMAN LAW

Easily paramount in importance in the American system of anti-trust laws is the Sherman Law, which was enacted July 2, 1890. Of far less importance for the purposes of the present paper are its two supplements, the Clayton Law and the Federal Trade Commission Law, both enacted in 1914.

In the present discussion, slight, if indeed any, attention will be given to these two supplementary Laws because the theme here undertaken can, it is believed, be adequately developed upon the basis of a consideration of the Sherman Law alone.

The immediate occasion which brought about the passage of that Law, in 1890, was the existence of a number of vast aggregations of capital which had then monopolized, or threatened to monopolize, many important branches of industry in this country, and seemed likely to drive out of existence smaller, independent business concerns.

The principal and controlling provision of the Sherman Law is its declaration that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" and every attempt to monopolize any part of such trade or commerce, is declared illegal and made the subject of penal provisions.

The fact that the Sherman Law is based upon the ancient common law of England was asserted without contradiction in the debates in the Senate, which resulted in the passage of that Law. Senator Sherman said:

> It does not announce a new principle of law, but applies old and well recognized principles of the common law.[3]

Senator Vest said:

> We have affirmed the old doctrine of the common law in regard to all interstate and international transactions, and have clothed the United States courts with authority to enforce that doctrine by injunction. We have put in, also, a grave penalty.[4]

Examination of the record of the debates in Congress which, throughout a period of two years, preceded the enactment of the Sherman Law, shows that the sole and single subject under discussion was the repression and prevention of the great aggregations of capital known as trusts. At no time during these debates was any suggestion made that the proposed law should be extended into the domain of private business which did not possess the qualities of a trust, and be made applicable to agreements among competitors in business in their effort to correct ruinous conditions of excessive competition. Space does not permit expansion of this assertion, but the informed reader will readily apprehend its importance, in its relation to the difficulties so widely confronting trade associations in this country in their attempted correction of ruinous conditions of competition with which many of them are confronted.

The conspicuously able and effective work performed by the present President of the United States when he was Secretary of Commerce, in his effort to relieve this condition, makes pertinent, in support of the above assertion as to the purpose for which the Sherman Law was enacted, the following quotation from an address delivered by Mr. Hoover in 1922,

[3] *Senate Debates*, March 21, 1890. 21 Cong. Rec., 2456.

[4] *Senate Debates*, April 8, 1890. 21 Cong. Rec., 3146.

while he was Secretary of Commerce. He said:

> At the time when the Sherman Act was passed the country was in the throes of growing consolidations of capital. These were consolidations of actual ownership, and the country was alive with complaints of attempts to crush competitors with unfair practices and destructive competition. Large numbers of trade associations were then in existence, but were scarcely even discussed in this connection.

In the early history of the Sherman Law the original purpose of that Law was maintained, and the prosecutions brought by the Government were directed entirely towards the disruption of great aggregations of capital in the nature of trusts. It was only by gradual development that the scope of that Law was extended into the domain of business generally, by the institution of many proceedings by the Government against various kinds of coöperative agreements entered into by competitors in business, not consolidated into aggregations of capital or trusts, whereby such competitors undertook to correct excessive conditions of competition which threatened their welfare and seemed even to imperil their future existence.

In the large number of cases thus instituted by the Government, the Federal courts have uniformly held such agreements to be unlawful restraints of trade and, therefore, in violation of the Sherman Law.

In diametrical opposition to the principles which govern such situations in England, Australia and Canada, the courts of this country have declared such agreements unlawful by the strict and unabated application of the rigorous principles of the ancient common law.

In *Standard Sanitary Mfg. Co.* v. *U. S.*,[5] the Supreme Court, speaking of the provisions of the Sherman Law, said:

> Nor can they be evaded by good motives. The Law has its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and it may be, of some good results.

In *Thomsen* v. *Cayser*,[6] the Court said:

> We have already seen that a combination is not excused because it was induced by good motives or produced good results.

In the more recent and now celebrated case of *U. S.* v. *Trenton Potteries Company, et al.*,[7] the Supreme Court declared it to be a violation of the Sherman Law for a number of competing manufacturers to enter into an agreement fixing the sales prices of their products—an agreement thought necessary to correct a ruinous state of competition—even though the prices thus fixed were reasonable. It would be difficult to exaggerate the disturbing effect caused by this decision upon every branch of competitive industry in the United States, particularly because during the past few years there has existed an almost universal state of overproduction and excessive competition among manufacturers, a condition difficult of correction in the absence of concerted agreement.

Many adjudicated cases could be added to those which have been cited, in order to show that the Sherman Law rigorously asserts and maintains the doctrine of ruthless competition and forbids the more sensible principle of coöperation.

As will be shown below, a totally different principle prevails in Great Britain, Australia and Canada. It is

[5] 226 U. S. 20.

[6] 243 U. S. 66.

[7] 273 U. S. 392.

proper to add that in Germany, France, Switzerland and other European countries, a condition of even greater liberality prevails than in England.[8]

In England, Australia and Canada, coöperative agreements designed for the welfare of an industry are regarded as lawful and are encouraged. In this country, the principle of competition based upon the ancient maxim that "competition is the life of trade," has been emphasized and enforced solely upon the narrow and mistaken standpoint that the interests of *consumers* are alone to be considered, and that consequently all coöperative agreements affecting the important elements of production, territory and prices are deemed unlawful because of the likelihood that their effect will be to increase prices to consumers. In England, Australia and Canada, as will be later shown, the interests of the *public as a whole* constitute the standard by which the subject is governed.

The difference thus shown to exist between the state of the law on this subject in this country and in the three countries named, is of the widest and most significant character. For, in cases where the welfare of an industry is threatened by ruinous competition or overproduction—no better illustration of such a situation can be given than in the existing conditions in the oil industry in this country—and coöperative agreements are clearly indicated as being necessary to correct such conditions, such agreements are prohibited in this country by the Sherman Law, upon the theory that the results may be injurious to consumers; whereas in England, Australia and Canada, as the cases cited below will demonstrate, such agreements are declared lawful whenever they are necessary for the preservation or welfare of the industry affected. This latter doctrine, by express declaration of the courts of those countries, is based upon a consideration of the welfare of the public as a whole, including in that designation not merely consumers, but also manufacturers, distributors and labor.

[8] See *Trust Laws and Unfair Competition.* Dept. of Commerce (1915); *Report on Coöperation in American Export Trade.* Fed. Trade Com. (1916).

STATE OF THE LAW IN FOREIGN COUNTRIES

England

The first substantial departure made by the Courts of England from the ancient principle of the common law was in the Mogul Steamship case.[9] This was an action brought by a shipping company against a number of other shipping companies for damages for a conspiracy to prevent the plaintiff from conducting the tea-carrying trade between China and England. In the interest of brevity, the purposes of the combination are here stated in the words used by Sir Frederick Pollock, Professor of Jurisprudence at Cambridge University, to be

> to grant a rebate to persons employing exclusively the ships of the conference whilst refusing it to anyone who employs a non-conference ship, and in case any non-conference steamer should attempt to load cargoes at Hankow, then to send as many conference ships as may be needed to underbid the independent steamer without any regard to profit.[10]

The combination thus assailed was declared lawful by the courts of England. In the opinion rendered by Lord Coleridge, he said:

> Further, they allege, and I think upon the evidence before me, truly allege, that they could not do this at a profit, and that they would therefore probably cease to do it at all, unless they can practically monopolize the carrying trade of tea during the China tea harvest. It is the large profit they make by keeping up the rate of tea freights which enables them to give a regular line of communication during the other months of the year. They contend, therefore, that what they did by the rules of the conference was not purely selfish, though, of course, self-interest guided them, but that there were real and large public benefits accruing to the inhabitants of China and England from the course which they pursued. I think there is ground for this contention and it should be kept in mind.[11]

[9] *Mogul SS. Co.* v. *McGregor Gow & Co.*, L. R. 21 Q. B. 544 (1888); L. R. 23 Q. B. 598 (1889); A. C. 25 (1892).

[10] *Law Quart. Rev.* (1890).

This case is here cited because of its striking contrast to the views held by our courts, as shown in the citations made above from the Standard Sanitary Manufacturing Company case and *Thomsen* v. *Cayser;* and as therefore fully establishing the proposition that the English courts have wholly abandoned the ancient common law doctrine, whereas our courts continue to adhere to it.

A much more striking illustration of the different situation existing in England from that which exists in this country, and in respects much more applicable to existing and urgent conditions prevailing in this country, as in the oil industry and many other important industries, is to be found in the recent English case of *Ware* v. *Motor Trade Association, et al.*[12] In that case the plaintiff sought an injunction against the defendant Association, on the ground that the Association had threatened to put the plaintiff's name on a stop list, the declared purpose of which was to prevent all dealers in motor cars and motor accessories in Great Britain from dealing with the plaintiff, the necessary result of which would have been to put the plaintiff out of business. Such action had been decided upon by the Association for the reason that the plaintiff, who was not even a member of the Association, had offered for sale a motor car at a price greater than that fixed in the price list published by the Association. The plaintiff charged that this action on the part of the Association constituted an unlawful restraint of trade. Under the Sherman Law, there is not the slightest doubt that such would have been the decision of our courts. The Court of Appeal of England, however, by the unanimous decision of its three members, upheld the action of the Association and denied the injunction prayed for by the plaintiff. Each of the three judges wrote opinions to the effect stated, the substance being that, if the welfare of the motor industry required coöperative agreements as to prices and other like subjects, it was lawful for such agreements to be made. In the opinion written by Lord Justice Atkin, he said:

> The Association consists of members who are engaged in the production and distribution of motor cars and their accessories. It is, in their opinion, in the interests of their trade that their members' goods should be distributed at their members' fixed prices, no more and no less. That this is a lawful object, I have no doubt. Manufacturers of goods in the motor trade are by no means the only class who adopt a similar policy. To insure their object they refuse to sell to anyone who refuses to sell at the fixed or list prices. In order to secure that their goods do not come into the hands of a recalcitrant seller, they refuse to sell their goods to anyone who supplies such a seller; and in order that the names of such sellers may be known to those concerned, they publish their names in the trade journals in what is called the stop list, which includes an intimation that, until further notice, those named in the list are not to be supplied with the goods in question. If the object be lawful, I find it

[11] L. R. 21 Q. B. 548

[12] 3 K. B. 40 (1921); 19 A. L. R. 893.

difficult to see why any of the above means of carrying out the object should be unlawful. If I were called upon to decide whether the measures taken by the Association were reasonable for the desired purpose, I should myself, I think, find them to be both reasonable and indeed, necessary, for I do not know how the object could otherwise be obtained. . . . However, it is sufficient for me that the Association and its members consider the course taken to be desirable in their trade interests.

In the opinion written by Bankes, L. J., he said:

The professed object of the Association is to maintain the price of all articles entered and published in the current protected list of the Association, or the price of which is protected by grant from the Association. The means by which this object is sought to be attained is by stopping the supply of any proprietary priced article, not only to any person whether a member of the Association or not who sells such an article above or below the protected price, but also by stopping the supply of such articles to any person who supplies such articles to an offending person.

After discussing the legal aspects of the case, he proceeds:

Accepting this view of the law, I cannot come to any other conclusion upon the evidence in this case except that what the defendants did, and what is complained of in the present action, was done by them bona fide in protection of their trade interests. Under these circumstances neither such coercion or threats as were used, nor the action by the defendants in combination, render their action, in my opinion, unlawful or actionable.

Having in mind the countless prosecutions brought by the Government in this country under the Sherman Law against coöperative agreements made by trade associations or by members of an industry, as in the Trenton Potteries case, agreements by no means so drastic as in the English case just cited, the wide contrast between the state of the law in England upon this subject and the state of the law in this country could not be more conspicuously displayed.

Obviously, the English courts proceeded upon the basis of a consideration of the public welfare taken as a whole, as against the principle which governs in this country, namely, protection of consumers against higher prices.

When it is considered that consumers are, to a practically complete extent, also producers, distributors or workers, it is impossible to understand upon what logical basis the prevailing principle in this country can be maintained in seeking to subserve the interests of consumers only, even though in so doing a much greater and more important advantage to the Commonwealth is disregarded, namely, the welfare or the preservation of industries, whose existence and welfare are indisputably necessary for the best interests of the Commonwealth as a whole and, therefore, of consumers also.

Australia

In the foregoing discussion, with respect to the state of the law upon this subject which prevails in England, it is to be borne in mind that there is no specific statute in England relating to this subject and that, therefore, the decisions above cited are based upon the modernized view of the ancient common law principles, which the courts of England have adopted.

In Australia, however, there is a specific statute, the very title of which is significant, namely, the Australian Industries Preservation Act. The title is significant as indicating that the purpose of that statute is the prohibition of acts in restraint of trade only when they threaten the existence of Australian industries; and not, as in the case of our Sherman Law, when such acts possess the possibility of causing increased prices to consumers. It thus appears that the declared purpose of the Australian law is exactly the same as was the stated purpose of Congress in enacting the Sherman Law, which purpose was afterwards enlarged by the decisions of our courts.

The Australian statute contains the express statements that actions claimed to be in restraint of trade shall be declared to be restraints of trade only when they are "to the *detriment of the public*," or when such acts are committed

with intent to destroy or injure by means of unfair competition any Australian industry, the preservation of which is advantageous to the Commonwealth, *having due regard to the interests of producers, workers and consumers.*[13]

The mere reading of this quoted language is sufficient to demonstrate the wide contrast between the legal situation existing in Australia as compared with that which exists in our country.

Full and complete demonstration of the economic widsom of the Australian statute is to be found in the illuminating opinions rendered by the Privy Council of Great Britain in the now celebrated Australian Colliers case.[14] That suit was brought by the Attorney General of Australia against forty defendants to recover pecuniary penalties for alleged breaches of the Australian Industries Preservation Act, and also for an injunction. The defendants consisted of a number of companies owning or working various coal mines in New South Wales, and also of four shipping companies. Briefly stated, the charges were that the coal operators had united in an agreement fixing the quantity of the output from their respective mines, and had thereupon entered into a contract with the shipping companies agreeing to sell their entire output to them at fixed prices, and likewise providing the prices at which such shipping companies should themselves sell the coal to dealers.

The Privy Council of England, upon an appeal taken from a decision of the Australian court, dismissed the Attorney General's suit and upheld the legality of the agreements mentioned.

In the opinion written by Lord Parker, he said:

It was also strongly urged in the term "detriment to the public," the public means the consuming public, and that the legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption.

Their Lordships do not take this view, but the matter is really of little importance, for in considering the interests of consumers it is impossible to disregard the interests of those who are engaged in production and distribution. It can never be in the interests of consumers that an article of consumption should cease to be produced and distributed; as it certainly would be unless those engaged in its production or distribution obtained a fair remuneration for the capital employed and the labor expended.

Lord Parker then proceeded to show the conditions which had existed in the coal industry in Australia which, as a result of ruinous competition, threatened the ruin of the entire industry. He then pointed out that those engaged in the industry had entered into agreements fixing the output of coal from each mine and fixing the prices of sale through each successive stage from the coal operators to the retail dealer, a situation which unquestionably would

[13] Italics supplied.

[14] *Attorney General of Australia* v. *Adelaide SS. Co.*, A. C. 781 (1913); *Law Jour.* (1914), Privy Council, 84.

have been declared unlawful under our Sherman Law. He then proceeded:

> It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced and prices will consequently rise until it becomes possible to re-open the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public. The Crown, therefore, cannot, in their Lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public. To prove an intention to injure the public by raising prices, the intention to charge excessive or unreasonable prices must be apparent.

The striking contrast between this language and the uniform course of the decisions in this country is too obvious to require comment.

The cited case seems to rest upon sound principles of political economy, in that it takes into account the interests and welfare of the Commonwealth as a whole, without overlooking the interests of consumers, because the concluding part of the quotation from Lord Parker's opinion shows that a different result would have been reached if "excessive or unreasonable prices" had been charged in the situation which was under consideration.

There is thus presented a symmetrical and systematic system of judicial interpretation whereby a condition, such as existed in the cited case, is adjudicated upon the basis of the welfare of the entire Commonwealth, viewed from the standpoint of the supreme need of maintaining the prosperity of the industries of such Commonwealth, and at the same time with proper watchfulness of the welfare of the consumers by seeing to it that the prices which result from such a situation are not excessive or unreasonable. Attention is again called to the sharp and striking contrast between the cited case and the Trenton Potteries case. This contrast is so marked and glaring as to require no comment, beyond the assertion that it seems to call loudly for a suitable amendment of the Sherman Law so as to assimilate it to the sound economic principles which underlie the Australian statute.

Canada

Like Australia, Canada also has a specific statute with relation to this subject, namely, a law known as the "Combines Investigation Act." In defining what shall be deemed to constitute unlawful restraints of trade, the Canadian law, in language similar to the Australian law, declares them unlawful when they

> have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others.

It will thus be seen that in Canada, just as in England and Australia, the protection of the law is given to the Commonwealth as a whole and not merely to consumers, as in this country.

The fact that the Canadian law is thus interpreted is shown in the proceedings brought against the Winnipeg Retail Coal Dealers Association. It was shown in that case that the members of the Association had entered into an agreement for the purpose of maintaining the retail prices of coal, in order to prevent ruinous competition which existed in their industry. A dealer had sold coal at less than the price fixed by the Association, which then took steps to prevent the dealer from obtaining further supplies of coal.

As a result of the investigation made in pursuance of the Canadian law, the agreement made by the Association was declared lawful upon the following grounds:

> Having regard to these abuses, which have been a real menace to the coal trade and a loss to producers for many years, one can scarcely find fault with the efforts of the Association, or others, to suppress such activities. The small gain to those who happened to buy at the reduced price is more than offset by the probable failure to obtain well prepared coal and the absence of these dealers carrying their fair share of the burden of necessary reserve supplies together with the injury they inflict upon bona fide dealers with large investments. . . . Upon these grounds I have come to the conclusion that, in its activities in endeavoring to limit or prevent this unfair competition, it has not operated to the detriment of, or against the best interests of, the public.

As indicating the wide applicability of the Canadian statute to prevent definitely injurious consequences to the public, space permits only a brief reference to the decision made under the Canadian law in respect of a complaint made against the Proprietary Articles Trade Association. Stated briefly, the charge against that Association was that its members had agreed together to control the sales prices of all their products so as to prevent predatory price-cutting by their customers. This is a situation very familiar in this country in connection with the price-cutting of trademarked articles. The result of the governmental investigation in that case was the finding that the Association had gone far beyond the mere prevention of price-cutting and had sought to establish a domination over the entire industry affected. Accordingly, the agreements made by the members of the Association were declared unlawful.

The following extract, from the report of the Canadian Government Investigator, indicates, at one and the same time, the greater liberality of the Canadian law as compared with our own law and the careful delineation of the limitation of that liberality, by declaring the agreements of the Association to be unlawful, because they had gone too far. It reads:

> From the viewpoint of the trade, the Proprietary Articles Trade Association is an attempt, promoted by wholesale and retail distributors, to reëstablish the wholesaler as the channel between manufacturer and retailer, or at least to enable him to hold his own in the trade, and at the same time to protect the smaller retailer from the price-cutting methods of his new and larger competitors. In so far as such price-cutting does not result from savings in operating expenses, but represents selling below cost for mere advertising purposes, it would seem to be unfair to the manufacturer as well as to competitors. If all price-cutting were of this type, and if this were the only type of price-cutting to be restrained by the Proprietary Articles Trade Association, there would be less occasion for public concern. But the remedy applied by the Proprietary Articles Trade Association has the effect, unfortunately, of preventing not only predatory price-cutting, but any reductions in price, regardless of the substantial variations which have been shown to exist in the operating costs and rates of stock-turn of different stores and different types of stores. . . . The Proprietary Articles Trade Association has been organized in answer to a real and vexatious problem in drug merchandising, but it goes far beyond the cause for legitimate complaint.

Neither the declared purpose of this paper, nor the necessary limitations of space, permits more than the briefest reference to the administrative provisions contained in the Canadian

Combines Investigation Act; but these provisions seem to have proven so effective in actual practice, that the following summary explanation is here given.

After defining, in the manner above stated, what acts constitute an unlawful restraint of trade, the Canadian Act provides for the appointment of an official known as the "Registrar of the Combines Investigation Act." It then provides that the general supervision of proceedings under the Act shall be under the supervision of the Minister of Labor, who is given authority to establish offices at various places in Canada for the discharge of the duties of the Registrar, and of any commissioners appointed by the Minister to assist the Registrar. The Registrar is empowered to receive applications, which must be signed by six persons, asking that the Registrar investigate a particular alleged combine or restraint of trade charged by such persons to be existing, and to bring to the attention of the Minister every such application. Upon receiving such application, "whenever the Registrar shall have reason to believe that a combine exists or is being formed, or whenever so directed by the Minister," the Registrar shall make an inquiry, both as to facts and law with respect to the charges so made. The Registrar must then report to the Minister the result of his investigation, and the Minister then decides whether further inquiry shall be made. The Registrar is given the power to require full disclosures from any person or corporation against whom such charges are made, and for that purpose "shall have power to investigate the business, and to enter and examine the premises, books, papers and records" of any person or corporation against whom such charge is made. The Minister is given power to employ expert and technical assistants to aid in the conduct of any investigation. The proceedings before the Registrar and every commissioner must be conducted in private, but the Minister may order that any portion of the proceedings shall be conducted in public.

The Registrar and the commissioners must report to the Minister the result of every investigation. Whenever such investigation, or the judgment of certain named courts of law, shows

> to the satisfaction of the Governor in Council that, with regard to any article of commerce, there exists any combine to promote unduly the advantage of manufacturers or dealers at the expense of the public, and if it appears to the Governor in Council that such disadvantage to the public is facilitated by the duties of custom imposed on the article, or on any like article, the Governor in Council may direct either that such article be admitted into Canada free of duty, or that the duty thereon be reduced to such amount or rate as will, in the opinion of the Governor in Council, give the public the benefit of reasonable competition.

Further provision is made that, if any letters patent are made the basis of such a combine or restraint of trade, such letters patent shall be subject to revocation by a proper order of the appropriate court.

In addition to the foregoing remedial provisions, the Canadian Act provides that whenever, in the opinion of the Minister of Labor, an offense has been committed against the said Act, the Minister may remit the subject to the proper law officers of the Canadian Government for prosecution, with provision to the effect that if there shall be delay in the beginning of such prosecution, any person may apply to the Solicitor General of Canada that proceedings be begun upon the relation of such person. Such proceedings shall be brought by indictment in order to invoke the penal provisions of the Canadian Act, namely, a fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, with respect to an individual, and a fine not exceeding twenty-five thousand dollars, with respect to a corporation. Further provision is made for proceedings against directors or officers of corporations, if it be found that they personally participated in the alleged wrongful acts of such corporation.

In addition to the foregoing, the Canadian Act contains carefully worked out provisions governing the administrative procedure—provisions which, judging from actual experience in Canadian cases, seem to have resulted in full success.

THE FALLACY OF THE AMERICAN SYSTEM

In a report recently made by a committee of an important industrial association in this country, the following was said:

> With an industrial productive capacity in certain lines far greater than America's present consumptive requirement, and with the ruinous competition which such a situation invites, has the time not come when industry should probably consider seriously the altering of the Sherman and the Clayton Acts, with the idea of more elasticity with respect to intelligent coöperation between, and possible combinations of, comparable but competitively destructive enterprises? Continental and British jurisprudence approaches the matter of combination with the dominant idea that the whole public is to be safeguarded; American jurisprudence looks only to the consumer.

This statement forcibly presents the sound logic and wisdom of the procedure which prevails, as has been shown above, in England, Australia and Canada, and presents a striking commentary upon the illogical basis of the American system.

Upon the basis of the statement just quoted and upon the basis of statements of high authority which will later be mentioned, it seems clear that the result of the rigorous principles maintained by the Sherman Law has been to exert a repressive and injurious effect upon the welfare of trade and commerce in this country. Our courts have, during the period of at least twenty years past, so extended the scope and the power of the Sherman Law that it is no longer limited to its original purpose of disrupting and preventing trusts and monopolies, but has in countless instances been directed against the practice, upon the part of plain business units which do not possess the power of becoming monopolies, of employing methods of coöperation among themselves for the purpose of averting ruinous competition and the demoralization of the particular industries affected.

Unlike the judicial principles which prevail in Great Britain, Australia and Canada, our anti-trust laws forbid coöperation among competitors, regardless of the good results and of the good purposes which may characterize such coöperation.

As has been shown, this stern interpretation of the Sherman Law constitutes a marked extension of its original purposes, and is based upon the proposition that competition, and not coöperation, is calculated to promote the welfare of our country. With relentless rigor, our courts have enforced the principle of competition, even when it is carried to the extent of ruinous or cut-throat competition in respect of prices, production or territory. In the jurisprudence of no other country does such a principle prevail. In our country, it is based on the mistaken theory that competition, although relentless and mutually destructive, is commendable and desira-

ble, merely because it tends to lower the prices of commodities to consumers. Upon the basis of the decisions above quoted, showing the procedure which prevails in England, Australia and Canada, it seems entirely proper to characterize the American system as unsound and false, because it fails to take into account the welfare of those who are engaged in production and distribution—that is to say, the manufacturers and the merchants of this country, as well as labor—but keeps in view solely and wrongfully the supposed benefit to consumers alone. Obviously, this doctrine is based on the ancient dogma that "competition is the life of trade," as against the more sane and modern maxim that "coöperation is the life of trade."

Passing by the contention that the Sherman Law does, in fact, prevent high prices to consumers, disproof of which may adequately be found in the high scale of prices which has prevailed during the past few years, it would seem to be a logical refutation of the correctness of the American system that the safeguarding of low prices is by no means the sole factor, or even the principal factor, in protecting the public welfare; for it is equally, if not more, important that manufacturers and distributors on the one hand, and labor, on the other hand, should be able to earn an adequate return on their investment of capital and for their expenditure of work. It is in this particular respect that our anti-trust laws are wholly at variance with the laws of all other countries. During the past few years, there has been an abundant volume of business transacted in this country; but, apart from the great, and in a certain sense, self-sufficient corporations of dominating magnitude, the great bulk of the manufacturing and distributing business of this country has been conducted without adequate profits.

It is scarcely open to dispute that the principal and controlling cause of this condition is to be found in the existing prohibition of the Sherman Law against sane and sensible agreements of coöperation among competitors, designed to prevent the ruinous and excessive competition which has been existing among the plain business units of this country.

A Suggested Remedy

As long ago as 1908, the present Chief Justice of the United States, William Howard Taft, while conducting his successful campaign for the Presidency, said:

> I am inclined to the opinion that the time is near at hand for an amendment of the Anti-Trust Law, defining in greater detail defaults against it and its aim, and making clearer the distinction between lawful agreements, reasonably restraining trade, and those which are pernicious in effect.

In a report made by the Committee on Commerce to the American Bar Association in September, 1927, that Committee said concerning the Sherman Law:

> If the Sherman Law were adapted to conditions existing at the time of its enactment, it is believed by your Committee that, even though it embodies a sound rule of law, it is not in all respects economically sound as presently interpreted. . . . A rule of conduct applicable to the simple conditions of English business as conducted hundreds of years ago, in a territory no larger than the State of Arkansas, may be impracticable when applied under the complexity of conditions now existing in the United States, a territory embracing an area sixty times as large as England.
>
> Not only is the Sherman Law economically unsound, but its application to individual cases is uncertain. . . .
>
> It is the view of your Committee that the country has outgrown the Sherman Law. . . . In England and in the British Colonies, the rule against restraints seems to be that only those are unlawful which are injurious to the public, including producer, consumer and laborer.

In support of this last statement, the Committee then cites the Australian Colliers case, from which quotations were made above.

The remedy for the existing situation seems, accordingly, to be the modification of our American system along the lines of that which prevails in England, Australia and Canada, with the additional procedural provisions which seem to have worked so successfully in the Canadian Combines Investigation Act.

The Need for a Commerce Court[1]

By William J. Donovan

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I PROPOSE to discuss the thesis, that there should be established a Federal agency with power to inquire into, consider and determine in advance the legality of industrial consolidations or trade agreements affecting competition.

For the purpose of this discussion it is assumed that the Sherman Anti-Trust Act is sound in principle, that it represents a political and social theory as well as an economic theory and that it is a philosophy of human relationship and has for its object to conserve the public interest by protecting it from economic exploitation.

Criticism of the Sherman Act comes today from two sources: first, those who insist that it should be repealed because it constitutes an undue limitation upon industry and a shackle upon the development of business, that it gives no definite rule by which business men may be guided and that this results in confusion and uncertainty; second, those who assert that the anti-trust laws are not properly enforced, and who, as proof of their assertion, cite the continued growth of industrial combinations.

We are concerned here with the second type of criticism.

The enforcement provisions of the Sherman Act were based upon the assumption that monopolies could be prevented and illegal trade agreements thwarted by a system of repressive legislation. It was believed that the effective method was to be found in the use of the machinery of the criminal law. We believed that all we needed to do was to pursue the conventional method of a public prosecutor, who, acting upon complaint, would submit the case to the determination of a court. But the Sherman Act itself, in fact, was not so much a criminal statute as the definition of a common law policy. The thirty-five years of its existence ought to show that the effective approach for carrying it into effect is through some preventive method that would arrest the evil before it could work harm.

[1] An address delivered at the meeting of the Pennsylvania Bar Association at Bedford Springs, Pennsylvania, June 28, 1929.

Proposed Administrative Remedies

There has been recognition of this fact, and attempts have been made from time to time to provide a remedy.

On March 25, 1908, President Roosevelt urged certain administrative remedies in the enforcement of the anti-trust laws. He stated in his message that his suggestion was only tentative and his views would apply equally to any other measure which would achieve the desired end. He said:

> The substantive part of the Anti-Trust Law should remain as at present; that is, every contract in restraint of trade or commerce among the several states or with foreign nations should continue to be declared illegal; provided, however, that some proper governmental authority (such as the Commissioner of Corporations acting under the Secretary of Commerce and Labor) be allowed to pass on any such contracts. Probably the best method of providing for this would be to enact that any contract subject to the prohibition contained in the Anti-Trust Law, into which it was desired to enter, might be filed with the Bureau of Corporations or other appropriate executive body. This would provide publicity. Within, say, sixty days of the filing—which period could be extended by order of the Department whenever for any reason it did not give the Department sufficient time for a thorough examination—the executive department having power might forbid the contract, which would then become subject to the provisions of the Anti-Trust Law, if at all in restraint of trade. If no such prohibition was issued, the contract would then only be liable to attack on the ground that it constituted an unreasonable restraint of trade. Whenever the period of filing had passed without any such prohibition, the contracts or combinations could be disapproved or forbidden only after notice and hearing with a reasonable provision for summary review on appeal by the courts.

In his message of January 7, 1910, President Taft recommended the enactment by Congress of a general law for the formation of corporations engaged in interstate commerce, protecting them from undue influence by the states and regulating their activities so as to prevent abuses. He said that he could find no other method which would offer Federal protection on the one hand, and close Federal supervision on the other, of these great organizations that are "in fact Federal because they are as wide as the country and entirely unlimited by state lines." On December 5, 1911, in pressing again for a statute which would permit the formation of capital into Federal corporations, he pointed out that the courts are not provided with the administrative machinery to make the necessary inquiries preparatory to reorganization under dissolution decrees. At that time he suggested that if there were a Federal incorporation act, a company organized under that act, while not being exempt from prosecution under the Anti-Trust Law for subsequent illegal conduct, would have a great security against prosecution by the publicity of its procedure and the opportunity for frequent consultation with the bureau or commission in charge of the incorporation.

On July 26, 1911, in the Taft Administration, a resolution was passed by the Senate authorizing the Senate Committee on Interstate Commerce to report to the Senate what changes were necessary or desirable in the laws relating to the control of those engaged in interstate commerce. Under this resolution exhaustive hearings were held covering every phase of the subject. This committee then submitted a report which discussed the desirability of legislation supplementary to the Sherman Act, and in dealing with the subject of a proposed trade commission declared

> that through the intervention of such a body of men the legislative policy with respect to combinations and monopolies could be made vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the law for months or years after they occur, and the difficulty of awarding reparation for the wrong is almost insurmountable.

However, no bill was reported and no additional action was taken on the part of the Senate under President Taft's Administration.

Proposed Interstate Trade Commission

On January 20, 1914, President Wilson addressed the Congress. He said:

> The business of the country awaits also, has long awaited and has suffered because it could not obtain further and more explicit legislative definition of the policy and meaning of the existing Anti-Trust Law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run

the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain. And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission. The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing-house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case. Producing industries, for example, which have passed the point up to which combination may be consistent with the public interest and the freedom of trade, can not always be dissected into their component units as readily as railroad companies or similar organizations can be. Their dissolution by ordinary legal process may oftentimes involve financial consequences likely to overwhelm the security market and bring upon it breakdown and confusion. There ought to be an administrative commission capable of directing and shaping such corrective processes, not only in aid of the courts but also by independent suggestion, if necessary.

The Senate acted upon the suggestions of President Wilson, but in the course of the discussion two divergent views developed as to the theory upon which such a commission should be based. One group believed that

> monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices.

Another group believed that "private monopoly is intolerable, unscientific and abnormal," and therefore ought to be prevented. But even this group was divided.

The view underlying the Federal Trade Commission Act and the Clayton Act as finally passed was that which held private monopoly to be undesirable but which disregarded the plea for giving advice in advance and was directed only to the need of obtaining better enforcement of the anti-trust laws. It was not intended that the Sherman Act should be affected. The new legislation was intended merely to supplement that Act. Whatever might be said as to the desirability of the new legislation, there still remained the vast field of uncertainty between the definite act of the business man in entering into a combine or a trade agreement and the act of the Attorney General in instituting proceedings. No agency had been set up to meet the difficulty or uncertainty that would be presented in that field.

The Commission established under the Act was given the power to condemn a certain course of action if it amounted to an unfair method of competition. It was not given the power to examine in advance a proposal of consolidation or trade agreement.

CHECKING ILLEGAL COMBINATIONS AT THEIR INCEPTION

Turning from the field of legislation to that of administration, it appears that from time to time in the administration of the Sherman Anti-Trust Act, various Attorney Generals have, in specific instances, expressed an opinion as to a proposed course of action. But these instances have been sporadic and comparatively few in number. They did not represent a definite policy of meeting industrial problems at their inception.

In the last Administration, however, there was adopted a definite and deliberate policy of attempting to meet at the threshhold the legality of proposals that might come within the prohibitions of the Sherman Act. This policy was adopted after careful study of the history of the enforcement of the Sherman Act during the years of its existence. It was felt that the fundamental principle underlying that Law was to prevent the organization and functioning of those concerns that violated the Law. That being so, it was considered that the effective and intelligent way to deal with the problem was not to wait until those concerns had become part of our industrial life, but to meet them at their inception, and to determine whether or not their existence would be a violation of the competitive principle. It was recognized that inherently there should be no hostility between legitimate business and government, and by the method adopted it was hoped that the honest business man would be able to avoid conflict with the law. At the same time the public interest would be preserved by assuring that illegal combinations would be dealt with at once.

It was realized, also, that an entirely new element had come into the financing of these consolidations. Formerly the marketing of stocks and bonds was limited to a relatively small group, but during the War the Government by its direct appeal to the individual gave a great stimulus to the tapping of new sources of capital in the hands of the citizen of small income. That citizen learned that a piece of paper might be an article of value. His experience with the Government led him to try other sources of investment. The result was that there was created a great reservoir of capital for the development of industrial enterprises. Ownership of industries thus became distributed among an unorganized and unrelated group of investors, who had no knowledge of the business and no effective methods of control. This being the fact, a new responsibility was placed upon those who would enforce the anti-trust laws. Any action that affected the financial structure of a given corporation would involve not only those who might have conspired to violate the Law, but, in addition, thousands of innocent holders of certificates who had made the purchase with hard earned savings.

INVESTIGATION OF ALL PROPOSED COMBINATIONS

It was felt that in order to have an effective administration of the Sherman Act there should be an intelligent appreciation of the practical problems that would be dealt with. It was not sufficient to work in a legalistic laboratory. It might make it easier for a Government official if he would decide that industry must be met in the court room and not in the department, but that method did not aid the honest business man who was anxious to know where he stood, nor did it fully protect the public. It was, therefore, determined to examine into all proposals of mergers, consolidations and all activities of trade associations. It was felt

that this would provide a real means of preserving the public interest by ascertaining facts in the beginning and assuring that illegal combinations should be dealt with before they could work harm.

The method adopted was a simple one. Every day the financial news would be systematically analyzed. As soon as knowledge was obtained of a proposed merger that might come within the provisions of the Sherman Act an inquiry would be started. Those concerned would be asked to submit their plan and investigation would be made into the financial structure, the purpose, the economic background and the necessary effect upon competition, if the merger should come into being. If upon the ascertainment of these facts it was determined that a prosecution was necessary, those concerned were so advised. If it was found that there would be no violation of the Law, the proposers were so advised, the data placed in the files and from time to time inquiry made as to the working and the operation of the plan. This was not done for the purpose of giving governmental approval or sanction to any enterprise. Those interested were simply advised that the Government found no present basis for the institution of proceedings. The warning was expressly given that, in the event that later developments should disclose violation of the Law, the Department of Justice reserved the right to institute such proceedings as might be necessary. There was no reckless bringing of suits, but effort was made to bring to issue those questions which were doubtful in order that decisions of the Supreme Court might serve as lighthouses in the uncertain sea of business.

For a period of four years that policy was carried out. It is interesting to note the result.

CONSTRUCTIVE RESULTS

On the constructive side it is believed that the method pursued not only afforded an opportunity for the honest industrialist to be sure of his step, but also that the close and immediate scrutiny of proposals acted as a deterrent to those who sought to evade the Law. Approximately two hundred and twenty-five proposals were examined during this four-year period, in addition to the number of suits instituted. On the disciplinary side, or active prosecution of suits, it may be of some interest to recite certain figures. Eighty-four suits were started during the seven and one-half years of the Coolidge Administration and one hundred and four cases were terminated. Of the cases terminated, fifteen were decided by the Supreme Court of the United States. This record compares favorably with the records of previous Administrations.

The experience of the last Administration is referred to only for the purpose of illustrating that the pursuit of a constructive method of dealing with those problems is not inconsistent with strict enforcement of disciplinary measures.

But in the adoption of means to meet these problems in advance it is not contended that the Department of Justice is the best place in which this can be done, and for these reasons. The assumption of these duties has no authority in law. It is justified only by the necessity of obtaining better enforcement. The Department is not organized to meet the difficult economic and financial questions that are presented. One man charged with that duty, where of necessity the work is done without publicity, is subjected to suspicion and criticism. No one man should be vested with so much power. Furthermore, his opinion, having no sanction in law, is no protection to the proposers of a particular plan.

The conclusion, then, is that the experience of the Department during the past few years denotes that it is necessary to set up additional machinery in order to make more effective the administration of the Law. What should that agency be and what should be its powers?

FOREIGN LEGISLATION

In dealing with the problem it is helpful to consider the steps being taken in other countries to meet their problem. An examination of the legislation in all these countries indicates that there is a growing recognition of the fact that it is only through administrative regulations that the two principles expressed in the debates in Congress at the time of the enactment of the Clayton Act and the Federal Trade Commission Act may be embodied in one, that is to say, may be embodied in an agency that will give industry an opportunity of greater certainty in what it shall do and the public greater protection in preventing what shall not be done.

Germany furnishes a striking example. It now has a law entitled "Decree Against Abuse of Economic Power." This decree, in substance, recognizes the legality of cartels but requires that they must not operate in such a way as to be prejudicial to the public welfare. Under this decree a Cartel Court has been established. If a proposed agreement or a certain method of enforcing it is considered to imperil the public welfare, application may be made to the Cartel Court to declare the proposed agreement void, or the cartel may be prohibited from carrying into effect any of the objectionable features of it. The Cartel Court may order that the agreement be entirely or partially canceled, or that the method of carrying it out be changed. It is expected that decisions of this court will constitute a code of industrial law for the future guidance of cartels. It is the establishment of this court in the German law which merits attention in considering additional legislation to meet the defects in the administration of the Sherman Act.

THE PROPOSED INDUSTRIAL COURT

It would seem feasible to set up in our Federal Government some kind of machinery that would carry out in a more effective manner the experiment of the last four years.

With this in mind the following suggestions are made:

1. That an Industrial Court should be established.
2. That for the purposes indicated this court should have jurisdiction of all interstate trade and commerce excepting public utilities.
3. That parties proposing to enter into a contract or combination should have the right to submit their plan to the court for determination as to whether the proposed action would be a violation of the anti-trust laws. Upon the approval by this court any acts done in accordance with that approval should be deemed lawful, provided, however, that should the subsequent acts of the parties go beyond, or deviate from, the plan submitted and approved by the court, such approval so given should in no way operate to give effect to, or immunity from, prosecution for such acts.
4. That the Attorney General should have the right to appear in opposition to such a plan, if he so desires, on the ground that its consummation would violate the anti-trust laws.
5. That such approval should be final unless within a designated time the Attorney General should request a rehearing.

6. That likewise the Attorney General should have the right to submit to the court any proposal or state of facts which had been submitted to him for an expression of his views as to its legality and concerning which he was doubtful.

7. That upon the dissolution of a corporation by decree of a court, the plan of reorganization be assigned to the Industrial Court for the formulation of a plan of construction and reorganization.

Objection may be made to the establishment of this court on the ground that such a court could have no jurisdiction of any proceeding which was not a case or controversy within the meaning of section three, article two, of the Constitution, that the proposals to be submitted to the Industrial Court would not constitute cases or controversies in the sense of that section and that the action of the Court would be merely an advisory proceeding in aid of executive action. An answer to this contention will be found in the case of *Ex Parte Bakelite*, recently decided in the October, 1928, term of the Supreme Court. That case involved the question whether Congress might authorize the Court of Customs Appeals to pass upon questions of law involved in a finding of the Tariff Commission which it proposed to report to the President. It appeared that the President might refuse to take affirmative action in accordance with a finding by the Commission approved by the Court of Customs Appeals. It was contended that as the decision of the court might be without affirmative force, the question could not properly be submitted to the court. The Supreme Court, in deciding that the Court of Appeals is a legislative and not a constitutional court, said:

> Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officials, or may commit it to judicial tribunals. Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by the courts; but no court can have cognizance of them except as Congress makes specific provision therefor. . . . While what has been said of the creation and special function of the court (of claims) definitely reflects its status as a legislative court, there is propriety in mentioning the fact that Congress always has treated it as having that status. From the outset Congress has required it to give merely advisory decisions on many matters. Under the act creating it all of its decisions were to be of that nature. Afterwards some were to have effect as binding judgments, but others were still to be merely advisory. This is true at the present time. *A duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under Article III.*

CONCLUSION

In this paper there has been no intention to suggest amendments to the Clayton Act, nor has there been an attempt to propose revision of the Federal Trade Commission Act. Experience under the working of both of these Acts has demonstrated that there should be some revision, but such revision is apart from the principle embodied in the idea of the Industrial Court.

There has been no effort here to work out in detail the procedure, limitations or jurisdiction of the proposed Industrial Court. Undoubtedly it would be advisable if its action could be final, with the reservation of certain doubtful questions of law to the Supreme Court. But whether final or not, it could serve a real purpose as an intermediate place before the Government would be committed to proceed under the Sherman Act. In no way would it emasculate the Sherman Act, and yet it would provide a test which the honest business man could regard with confidence when he had in view the acquisition of the property of a competitor. This court would constitute a tribunal in which in a concrete case definite application of the rule of public policy could be made. The confusion which now exists in the minds of cautious business men and which may often result in preventing the adoption of constructive measures in the public interest would be avoided. At the same time this court could be used as an immediate deterrent to those who would attempt to exploit the public by evasion of the Law.

The problems presented in our present industrial age call for some such method. Legislative investigation for the past fifteen years indicates its necessity. Experience in the enforcement of the Law has demonstrated its advisability.

Experiments in other countries have indicated that repressive measures alone are not sufficient. Wisdom dictates that, before we are driven to broader governmental control or participation in business, it is desirable that by furnishing guidance and advice the initiative and the resourcefulness of our industrial life shall be preserved.

Advisory Councils to Government

By Nathan B. Williams

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BOTH business and professional men, laymen and legislators, executives and entrepreneurs, often privately profess both distress and disturbance as to what they apprehend has happened or is going to happen to the relation of government to business. So-called anti-trust laws are discussed much as is the weather, but as Mark Twain once remarked, "Nobody seems to do anything about it."

Problem of the Legislator

Legislators, while vociferously voicing their determination to cause to be invoked the law, every now and then take out from the application of these laws varying groups: railroads, public utilities, farmers, laborers, and so forth; while the courts are called upon to revise decrees against packers and these find support for their plea from erstwhile opponents. Meanwhile, the merger movement under strong economic urge goes striding forward and the stock market gets frenzied support from twenty million small speculator-investors who are determined to own a few shares in our great industries, confident in the destiny of our great business enterprises. Likewise the advance of scientific attainment, and the growth of new economic conception that high earnings for the individual are in accord with the possibilities of wider markets and lower costs, daily presents a new picture in which legal prohibitions take a constantly diminishing part.

The American legislator understands no better than other legislators the new technical sciences with which he has to deal, and he is puzzled and uncomfortable in passing laws he does not understand to remedy conditions he cannot explain.

Government is political. Quite likely it must, and always should, so remain. Mass government will probably be a full test for its capacities. Modern mass production, mass distribution, mass credit and mass enterprise are, generally, and must remain, without the scope of government, except as to most general rules and specific kinds of malevolence. But the political theory comprehends and asserts that only ordinary intelligence and average equipment are necessary for one to make a success in administering the affairs of government. President Jackson, in his first message to Congress, wrote:

> The duties of all public offices are, or at least admit of being, made so plain that men of intelligence may readily qualify themselves for their performance.

Government and Business Coöperation

Modern government and modern business call for a higher degree of knowledge for successful functioning than in the simple times of Jackson. They call for the assembly of facts, for the experience and keen judgment of many experienced and thoughtful persons, for far-flung technical knowledge, not only of home conditions but of distant peoples and other governments as well. They call for perspicacity, for vision and for the full realization that neither business nor government may continue to grow and prosper on principles or methods not to the advantage of the whole body of individuals who compose the nation

and have ever in mind their continued advancement under the best possible conditions.

Such a prospect calls for the mobilization as an aid to, and an integral part of, government, helpful alike to government and the business activities of the citizen, of sufficient groups which will enable government to make use of their stock of knowledge and scientific and business wisdom. Literally thousands of men in their business groups have had, and are daily accumulating, experience in self-government and concerning their relations with government itself. How and in what manner government and our industrial civilization may be so integrated as to give proper direction and force to this new condition in American life is an executive and administrative problem. It has little or no concern with politics or politicians.

Government and business are essentially one. Governmental activities may not be carried forward without revenue and this revenue is supplied by the business activities of the citizen.

What I suggest is not new in theory, nor substantially new in practical application. The Department of Commerce, under the administration of Mr. Hoover, has had vast experience in the past eight years, in its conferences and contacts, in its committees of simplification and present census advisory bodies, in the development of uniform thought and opinion upon many commercial and industrial problems.

What I propose is an agency whereby business opinion may be ascertained and applied to the problems of administration and to be so developed and integrated that it may be instantly swung into action in support of that efficient executive administration to which the business of the country looks forward with present justified hopefulness.

Purpose of Councils

It would seem that such results may be most successfully accomplished by the establishment of *advisory councils* made up partly of officers of the Government and partly of persons selected from private life, which councils would have for their objective the determination to consider and supply advice regarding the manner in which problems coming before administrative services for action should be met.

As pointed out by Dr. Willoughby in his volume on *Principles of Public Administration*, there is a need for the creation in each of the great fields of governmental activities of a council that would embrace, on the one hand, the heads or representatives of the Government services working in that field and, on the other, representatives of the private organizations, the members of which are directly interested in that field of endeavor.

In the establishment of such a council, I think it must be recognized that the well organized industry association, the creation of a group of business men engaged in the same common line of endeavor, is the only effective contact through which the constituent members of each such group may be reached. For this reason, in setting up such an advisory council, I would restrict its industrial representation to those from national organizations directly related to a *particular industry*.

It would not be contemplated that any such council should in any way supersede respective industry associations in the handling of the detail of their individual problems, but be the liaison agency between business and government, developing and transmitting the knowledge and views of each to the other.

The presentation of facts, arguments

and opinions is primarily the responsibility and duty of that association or industry directly affected. But when a governmental policy is to be undertaken or legislation enacted which in principle affects all industry, that is something else again, and would present a situation concerning which it might be reasonably expected that a review by a number of such duly established bodies would be advisable.

CONCRETE APPLICATIONS

From the multitude of problems which occur to which such advisory councils might be expected to give useful attention, we select the following as characteristic.

The activities of the Federal Government are so far-flung, its expenditures so huge, that only by the most careful balancing of funds can economies be effected or unwise expenditures be forestalled. Our bill for taxes is written by the sum of our governmental expenditures. The Bureau of the Budget attempts to control and coördinate these, but it needs the aid of outside effort. It could use qualified and studious business opinion. Suppose such an advisory council as suggested should set up a qualified staff to study government operations and expenditures, and that the results of such study, after being reviewed by such council, should periodically be laid before the Bureau of the Budget and the committees of Congress dealing with appropriations. These recommendations would undoubtedly have a beneficial effect. Such work could most certainly save the taxpayer millions of dollars in further economies, but it also could head off many unwise proposals and be of incalculable public service. Undoubtedly the Bureau of the Budget would welcome such assistance, nor would such an effort be highly expensive. Since such work would be done in the interest of all taxpayers, it should be participated in by as wide a base of industries as could possibly be assembled, not only for the purpose of distributing the expense but in order to secure as many interests and viewpoints upon particular problems as possible.

Another example is our need for the consideration of demanded attention to the conservation of our oil resources. Such a council should include oil producers, consumers and Government agencies having to do with this resource, but legally recognized and respected. Hundreds of other instances will readily occur to the reader, such as those relating to crops and the marketing thereof, merchant marine, water power, stream development, forestry policies and numerous others.

A not inconsiderable result would be the gradual integration of business organizations as to field and scope and their official recognition in the public scheme of things, as well as the mobilization of business experience, initiative and judgment, thereby giving recognition to outstanding individual and associated service.

DEALING WITH THE LOBBY

Then there is the oft recurring problem of the "Lobby." Let an act be passed authorizing the setting up of advisory councils to government, as above outlined, by the several executive departments, bureaus, divisions or agencies, as may be convinced of their necessity or usefulness, membership therein to be restricted as indicated. Thus, an association by the establishment of such a council would receive in effect a certificate of convenience and necessity and recognition of its authority as the spokesman of the industry. All others, while not denied the constitutional right of petition, would be thus forced to disclose the identity of their interest and would presumptively be in the outer fringes of stable, efficient and well ordered governmental development.

Thus, automatically would be accomplished that much desired division between the considered and authorized presentation of group opinion upon pending or proposed legislation and those who trade on the credulous by the assertion of the power of their personal influence. Government, whether in legislative or executive division, would be improved as well as dignified.

The idea and principle here set forth are of equal application to state and municipal affairs as to those of the nation.

Regulated Monopoly versus Enforced Competition

The German Experiment

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THE method of dealing with trusts and combines which has been adopted by Germany affords a striking contrast to the method employed in the United States. Our assumption that monopoly is evil in itself, and that "trust-busting" is consequently a crusade for social and economic righteousness, is not shared in Germany. Her laws and ordinances express very clearly a quite different doctrine, namely, that the evil so often associated with trusts lies not in monopoly or large organization per se, but in the use of great economic power to secure private advantage at the cost of public welfare. Not "anti-trust laws," therefore, are found in her statute books, but laws controlling and regulating trusts, monopolies and cartels, with a view to making them serve the general good.

It is true that the German Reich has a much freer hand in such matters than has the United States. The Constitution of 1919 gives to the Reich legislative power over the production, manufacture, distribution and price regulation of economic goods for the general economy, commerce, the banking system, the exchange system, traffic in foodstuffs and luxuries, as well as objects of everyday necessity, industry, mining, insurance, railways and main highways.[1]

It further provides:

> The Reich can take over by law as public property, without prejudice to compensation and with suitable application of the provisions which hold for expropriation, private economic enterprises suitable for socialization. It can engage itself, the states or the communes in the administration of economic enterprises and associations, or it may secure for itself in other ways a controlling influence upon them.
>
> In case of urgent need, the Reich can also unite by law economic enterprises and associations on a basis of self-administration, for socio-economic purposes, with the object of securing the coöperation of all productive elements of the population, of giving a share in the administration to employers and employees, and of regulating the production, manufacture, distribution, consumption, price-fixing, importation and exportation of economic goods, according to the fundamental principles of social economy.[2]

It is obvious that with such powers the Reich is in a position to control or handle economic enterprises in almost any way that seems advisable, under a given set of circumstances.

The question at once arises: What have been its most important problems in this field and what methods has it employed for their solution? This paper will indicate very briefly some of the outstanding problems and methods.[3]

The Railways

The organization of the national railways was an extremely important problem, not only intrinsically, but because the earnings of the railways must provide a considerable portion of the funds for reparation payments. Although the Dawes plan is responsible for certain features of the organization as finally achieved, yet the general structure is in keeping with Germany's methods of economic control.

In accordance with the Dawes plan, the existing German railways were transferred to a company known as the German National Railway Company, the legal status of which is fixed by the National Railway Law and a supplemental statute.[4] The general legal relationships of the ordinary trading corporation are not applicable to this company, since it "is a corporation of a special kind, partly of a civil-legal and partly of a public-legal nature."[5]

In its quality as a private enterprise the company operates strictly under the terms of the concession agreement and the laws, for a definite limited period, until 1964. The Reich virtually loses the right of control over the railroads for this period. The private nature of the company is shown by the fact that the national budget law is not applicable to the National Railway Company. Its receipts and expenditures do not appear in the budget, nor are its accounts under the control of the budget law, but of a special law.

The quasi-public character of this company, however, is shown by the following facts:

1. The Reich guarantees the payment of the dividends on the preferred shares of the Railway Company. One-fourth of the proceeds of the sale of these shares of preferred stock becomes the property of the Reich, and by far the greater part of these preferred shares was purchased by the Reich or other public services.[6]

2. One-half of the members of the administrative council are appointed by the German national cabinet. The cabinet has general supervisory power, the right of consent in respect to specific matters and a certain right of cooperation.

3. The property of the national railways belongs to the Reich, including the equipment and real estate acquired in the future; and upon the termination of the concession the entire right of operation, as well as other rights and obligations, will revert to the state.

4. The status of officers, employees and workers connected with the national railway system, although governed by a special law, approximates that of national officers.

The Post, Telegraph, Telephone and Radio

The post, telegraph, telephone and radio systems of Germany are handled as a Government monopoly. They form an independent business undertaking under the name of "The German National Post." All property of this enterprise is handled separately from the remaining property of the Reich, as the special property of the German National Post. This special property is liable only for the obligations of the National Post and may not be made liable for other national contracts and obligations.

The National Post Minister is the chief direct administrative authority in the postal administration. He is also chairman of the administrative council, which consists of thirty-one members appointed by the National

[1] Art. 7.

[2] Art. 156.

[3] For fuller discussion, see Blachly and Oatman, *The Government and Administration of Germany*, ch. XVI; and Quigley and Clark, *Republican Germany*, Bk. II.

[4] See *Reichsgesetzblatt*, 1924, pt. II, pp. 272, 281.

[5] Hue de Grais, *Handbuch der Verfassung und Verwaltung*, 23rd ed. (1926), p. 663.

[6] Out of 881 millions of marks of preferred shares issued up to June 1, 1927, 88.5 percent were taken up by the Reich or other public services. Report of the Commissioner of the German Railways, June 1, 1927.

President. Seven members are proposed respectively by the Reichstag and the Reichsrat, and one member by the National Minister of Finance. Seven members are proposed by the Post Minister, in conference with the Minister of Finance and the Reichsrat, from among the personnel of the German National Post. The remaining members are to possess special knowledge and expertness in regard to economics and traffic. The states have a right to send representatives to the sittings of the administrative council, but these do not have the right to vote. They do, however, have the right to make proposals and inquiries and to cause a decision to be made in respect to them. It will thus be seen that the national interests, the interests of the states and the views of expert opinion are represented in the council.

The administrative council passes upon the most important questions relating to the postal administration. The cabinet decides, upon the proposal of the Post Minister, whether the carrying out of a resolution of the administrative council is justified in the interests of the Reich.

The entire expenditures of the German National Post, as well as the interest and the amortization of the debts, are to be covered by income, and no additional sums are to be granted out of the National Treasury. Credits can only be used for strengthening the business property, and interest and amortization must be guaranteed from operating income.

From this brief examination of the communication system of the Reich, it is evident that from the viewpoint of organization and administration the National Post is an integral part of the national administrative system. From a financial viewpoint it is conducted as a separate undertaking, paying its own way and responsible for its own assets and liabilities. It is, however, under national accounting control, and its financial administration is partly subject to the control of the Minister of Finance.

Although the organization of the postal administration corresponds quite closely to the organization of an ordinary corporation with a president and a board of directors, there are several differences. The officer who stands at the head is at the same time a member of the chief national administrative authority, the cabinet. As such, his plans are to a greater or less extent controlled by the other members of the cabinet, and he is further responsible to the Reichstag. Again, the administrative council, instead of being composed of stockholders, as in an ordinary corporation, is chosen in such a way as to represent the viewpoint of the cabinet, the Reichstag and the states, as well as the economic interests of the public.

THE COAL UNION

A law for the regulation of coal economy was passed by Germany on March 23, 1919, and the cabinet issued the executory provisions on August 21, 1919. This law applies to hard coal, soft coal, pressed coal and coke secured from coal.

According to this law, the coal producing areas are divided into eleven districts, partly on a geographical and partly on a geological basis. The operators of the coal mines of each district are required to form themselves into a coal syndicate. The National Coal Union may also require every owner of an independent coal establishment, pressed coal manufactory or similar enterprise, to join a district syndicate. Each coal syndicate has a supervisory council, which is composed partly of workers and partly of employers.

The various coal and coal gas syndicates, and the German states which as owners of the coal mines belong to syndicates, are united in a central association called the *Reichskohlenverband*, or the National Coal Union. The National Coal Council is the most important administrative authority of this organization. It consists of sixty members, representing states, mines, gas plants, technical mining employees, coal dealers, coal using industries, workers, representatives of railways, shipping and other interested groups.

The National Coal Council directs the entire fuel economy, under the supervision of the Reich. The contracts of the National Coal Union and of the syndicates are not valid without its consent. It outlines the general policies in respect to fuel economy, especially for the elimination of non-economic competition and for the protection of the consumers.

The National Coal Union oversees the execution of the general lines of policy laid down by the National Coal Council, issues executory measures for this purpose, supervises the obligations placed upon the syndicates, limits the sales of individual syndicates, establishes the general principles of price reductions, passes on questions of import and export and otherwise develops large general policies.

The coal syndicates supervise the execution of the general lines of policy and of all the orders and decisions of the National Coal Council and the National Coal Union, regulate the demand, use, production or non-production of fuels by their members, sell the fuel given over to them, establish general conditions of delivery and supervise the execution of these conditions. They may make suggestions and proposals to the National Coal Union, especially in regard to prices.

The whole matter of economic policy in regard to fuel is under the supervision of the Reich, through the National Minister of Economics. He can demand information from all members of the above described organization. He is authorized to participate, either in person or through commissioners or representatives, in all discussions of the National Coal Council, the expert committees of the Coal Union and the syndicates or their organs. Various kinds of action are subject to his consent.

THE POTASH INDUSTRY

Because of the importance of potash in the economic and industrial life of Germany, the organization and control of the potash industry have been carefully worked out.[7] All potash producers, including mine operators and manufacturers of potash and potash products, are required to form themselves into syndicates. The syndicates are represented in a central organization called the National Potash Council, which also contains representatives of employees, the German states, agricultural consumers of potash and other specially interested groups. The National Potash Council, under the supervision of the Reich, conducts the potash industry as governed by law, in accordance with the principles of public economy. It approves the corporation charter of the potash syndicate, controls the business of the potash office and lays down general principles of potash economy. Upon the proposal of the potash examining office or the potash appeal office, it may order the payment of compensation and the closing down

[7] See law of July 19, 1919, and executory ordinances, *Reichsgesetzblatt*, 1919, pp. 661, 663; *ibid.*, 1921, pp. 824, 1312; *ibid.*, 1923, pt. II, p. 229; *ibid.*, 1924, pt. II, pp. 44, 155; *ibid.*, 1925, pt. II, p. 1159.

of particular manufactories. Upon reasoned proposals of the potash syndicate, it has the right to establish the sale price for domestic purchasers. It can make price reductions for large purchases, for cash payment or for those furthering potash sales. It makes provision for the securing of an average wage for workers and employees of the potash industry.

The potash examining office is a special agency which establishes the relationship of the share of individual producers and manufacturers to the entire sale. It oversees the execution of provisions regarding prices, price reductions, freight adjustments, classifications, average wage, and the like, laid down by the National Potash Council. Against the provisions enacted and the decisions made by the potash examining office, an appeal lies to the potash appeal office, within a month after the decision is made.

The potash salary inspection office is charged with the execution of the provisions laid down by the National Potash Council for the guaranteeing of the average wage of workers and the salary of employees.

Not only must the members of the potash syndicate give the products produced or manufactured by them to the syndicate for disposal, but the syndicate is exclusively authorized to sell these potash salts and combinations. The importation of potash salts, products and combinations from abroad belongs exclusively to the syndicate. The syndicate regulates the sales upon the ground of share quotas, which are filled according to the capacity and the condition of the potash producer, and his ability to make deliveries.

The Reich maintains supervision over the potash industry through the National Minister of Economics.

THE IRON INDUSTRY

The iron industry is managed by a self-administering body, created by national ordinance and possessing a legal personality, called the Iron Industrial Union. It does not possess so many characteristics of a quasi-public nature as some of the other authorities which we have examined, but since it is created by law, is governed according to the principles of law and is supervised by the Reich under the law, it may be considered as one of these self-administering bodies.

The Iron Industrial Union consists of representatives of producers, dealers and consumers. It has the following organs: the full assembly, the working committees and the manager. The full assembly consists of seventy members, thirty-four representing producers, twelve representing dealers and twenty-four representing consumers. In these groups employers and workers are to be represented in like numbers. The assembly appoints working committees as various needs arise. Certain of these committees are required by law. The manager is elected by the full assembly, upon the proposal of the producing employers. One or more persons may be chosen as his representative. The manager and his representatives are the legal representatives of the Iron Industrial Union.

The full assembly of the Iron Industrial Union directs the iron industry, including both export and import, according to the principles of general economic interest, under the supervision of the Reich. The working committees manage affairs involving technical and expert questions, and make certain decisions, within the limits established by the full assembly. The manager carries out the general policies, the decisions of the full assembly and those of the working committees.

All domestic plants producing the iron products enumerated in the law, except scrap iron, are required to place a portion of their products at the disposal of the Iron Industrial Union, for the purpose of meeting pressing domestic needs, before wholly or partially meeting their other obligations to deliver. The National Minister of Economics, after an understanding with the Union, fixes the quantity of each of these products.

The Iron Industrial Union regulates the price and selling conditions of the iron products listed in the law as for domestic sale. The National Minister of Economics can provide that the domestic price must be established uniformly for the national territory, and that this price may also be valid for the sale to the manufacturer of exported products. He has other important regulatory powers. It is obvious that over and above the Iron Industrial Union stands the Reich as a supervisory authority.

ELECTRICITY

A law of December 31, 1919, provided for the socialization of the electrical industry, the districting of the national territory into electrical districts and the taking over of private electrical enterprises by the Reich, the states and the communes. This law has not been enforced as a whole, although very great progress has been made in socialization. Through the taking over of some electrical enterprises, the combining of others and the purchasing of a controlling interest in others, the states, cities and the National Government in Germany today control nearly eighty percent of the production of electricity and about fifty percent of the distribution. This control is particularly noticeable in respect to the creation of very large central power and distributing enterprises. These enormous power plants, with high voltage distributing systems, act as a central coördinating agency for very wide areas, and link up smaller undertakings in a main system. The extent of this state control is seen by the fact that of the 1,370 electrical concerns which supply the public, six hundred and thirty, with a current production of 4.3 milliard k.w.h., are entirely public. Moreover, the public has a controlling interest in 147 mixed enterprises, that is, enterprises in which both the public and private individuals hold stock. Seventy-six percent of the electrical current produced (excepting that which is produced by individual concerns for their own use) is produced by works that are either public or semi-public (mixed economic enterprises).[8]

OTHER ENTERPRISES

The above described enterprises are merely the most striking examples of many which might be listed here, did not the limitations of space forbid. Governmental control over trusts and monopolies is by no means confined, however, to participation or supervision after the fashions depicted in the foregoing pages. An ordinance of 1923,[9] "against the abuse of situations of economic power," gives to the National Government a very definite control over all such organizations.

This ordinance establishes a Cartel Court in connection with the National Economic Court. It requires that all contracts and agreements as to the management of production or marketing, the application of conditions governing trade or methods of fixing or maintaining prices, must be in

[8] Deutsches Reich, *Wirtschaft und Statistik*, 7th year (1927), p. 497.

[9] Ordinance of November 2, 1923. *Reichsgesetzblatt*, 1923, pt. I, p. 1067.

written form. The National Minister of Economics, if he considers that a contract or agreement of such nature is economically injurious or opposed to the general welfare, may ask the Cartel Court to invalidate it in whole or in part, or to prohibit a specific method of carrying it into effect; or he may announce that parties to such arrangement may withdraw without notice, or may order that no arrangements for carrying out the contract shall become effective until he has been informed of them.

The whole economic situation, or the general welfare, is to be considered as endangered particularly when (in a way not justified by national economy) production or sale is limited, prices are increased or held high, extra charge is made for hazard, or economic freedom is unfairly injured by impediments to buying or selling or by the establishing of discriminatory rates or conditions. If the Cartel Court shall declare void a part of a contract or agreement, it must decide whether, and to what extent, the invalidity of this part involves the invalidity of other parts.

Any party to a contract or agreement of the type under consideration may withdraw from it, if there are important reasons for such action. Unfair restriction of the economic freedom of action of the person withdrawing, especially in respect to production, sale or price-fixing, is always to be considered an important reason. If other parties to the contract object to the withdrawal, they may ask the Cartel Court to decide whether it was justified.

It will be seen that the Cartel Court is far more than a judicial body, in the strict sense. The duties laid upon it involve the determination of public economic policy to a considerable extent; and its control over private enterprises is not entirely legal, but discretionary. As its permission is a necessary preliminary, the discretion of the Cartel Court is called upon whenever securities are to be issued or debts or obligations are to be incurred, on the basis of the contracts and agreements affected by the ordinance. The permission must be refused "if the measures involve a danger to the whole economic situation or the general welfare, or if the economic freedom of action of those affected by it would be unfairly restricted."[10]

An even more striking example of discretionary power is found in the following provision:

> If conditions governing trade, or methods of price-fixing by business enterprises or associations thereof (trusts, associations on a basis of common interest, syndicates, cartels, conventions and other group organizations) are liable, by taking advantage of situations of economic power, to injure the whole economic situation or the general welfare . . . the Cartel Court, on the motion of the National Minister of Economics, can state generally, that the prejudicial portions of all contracts which have been concluded under the objectionable conditions can be withdrawn. If it is demonstrated that the contract would have been concluded even without the objectionable conditions, the decision of the Cartel Court reaches only to the withdrawal of the objectionable conditions governing trade, or of the price agreements made on the basis of the objectionable method of fixing prices.[11]

The National Minister of Economics may request the opinion of the Cartel Court upon specific questions affecting the administration of the ordinance

[10] Ordinance cited, Sec. 9.

[11] *Ibid.*, Sec. 10. The actual decision of suits on such questions as to whether, or to what extent, withdrawals from contracts are permissible, or whether given contracts are invalid in whole or in part, under the general conditions outlined by the Cartel Court, is left in the hands of the ordinary civil tribunals.

under consideration, and may require the Court to hear representatives of the highest economic associations concerned, before the opinion is rendered.

The Cartel Court may impose certain penalties, including a fine, the maximum of which is unlimited, for the violation of specific provisions; and fine and imprisonment for the attempt to injure in an economic way a person who exercises his right of withdrawal under the ordinance.

The Cartel Court has been in operation only a few years, but its decisions have shown no tendency to antagonize or destroy economic associations.

> The German Government had no intention of entering . . . on an anti-trust campaign: it desired above all to regularize the position of cartels, guide the course of industrial organization, while legally conceding the principle of combination, and use the instruments already in existence for the improvement of the economic position of Germany.[12]

CONCLUSIONS

Despite the considerable variety of methods employed by Germany in dealing with trusts and corporations, a fairly consistent public policy is displayed. This policy may be designated as the encouragement of regulated monopoly. The advantages of large scale production are to be obtained, and abuses on the part of the great corporations and trusts are to be prevented, by a policy which not merely permits, but occasionally even demands, association that involves monopoly, yet secures continuous supervision, effective regulation and powerful control, in the interests of the public. This policy is designed to steer between Scylla and Charybdis by avoiding, so far as is humanly possible, both the inevitable wastes of competition and the potential abuses of uncontrolled monopoly.

An admirable realism appears in the selection of the enterprises which are taken over in whole or in part into public ownership. By and large, these enterprises are such as would be called in this country public utilities; although public participation in business is not confined to this type, but includes such diverse enterprises as aluminum and ship-building.

Throughout the administration and practical application of the general policy which has been described, much flexibility and great ingenuity are displayed. Thus, the railways are owned by the Reich, but operated after the fashion of a private enterprise, yet with certain public participation and control; the electrical production and distributing industry is largely owned by the Reich, the member states and various municipalities, although as yet public ownership has not been completely worked out; the post office, the telephone, telegraph and radio systems are entirely owned by the Reich, but are administered as a business enterprise with a separate budget; the waterways are controlled by the Reich, but their ownership, like that of the electrical industry, is partially public, partially private and partially "mixed." The so-called "mixed economic enterprise" is one of the most interesting forms of control. Any or all of the units of government, from the Reich to a city, private individuals and economic or business associations, may own the stock of an enterprise in any proportion. In this case public control may be exercised wholly through stock ownership, or special ordinances or laws may provide for further control. Such great flexibility and variety of method of control are due in part to the fact that the Constitution gives the Reich almost unlimited powers for

[12] Quigley and Clark, *Republican Germany*, p. 233.

handling the entire economic situation, and that the powers of the states do not stand in the way. Other causes lie in the history of Germany's economic and industrial development, and particularly in the post-War situation, which necessitated points of view and methods of organization that would integrate the interests of business enterprises with the needs of the German people and of the state.

The reasons for regulation through compulsory self-administration are more far-reaching in economic significance than the reasons advanced for public utility regulation and ownership, which are identical with those advanced elsewhere. They may be said to be: The need to guard the interests of the nation as a whole in respect to the use of man power; the need to adjust the relationships between employers and employees through a joint participation in policy; the need to eliminate the difficulties of overproduction and cut-throat competition, the exploitation of natural resources and the expense of cross freight rates; the need to guard the interests of consumers through a joint control of industry; and, finally, the need to prevent injurious foreign competition and to provide for a better organization for capturing foreign markets.

This method of control would seem to have very great advantages for large raw product industries such as coal, iron, potash, oil, lumber, and the like, where the elements of conservation of the natural product, as well as of human energy, are of vital importance, and where unregulated competition is injurious alike to workers, producers and consumers. It is doubtful, however, whether the constitutional system of the United States would permit any such adequate control as that found in Germany.

The method of stock ownership by the Government, as a way of eliminating the evils that may result from uncontrolled combination and monopoly, presents many possibilities. Instead of trying to control externally, as is done in the United States through the operation of the anti-trust laws and the work of the Federal Trade Commission, the attempt is made to control through the direction of the company within the board of directors. Will such control do away with the necessity of the continuous fight that is waged by other governments against various businesses, in a vain attempt to enforce competition? Does it tend to protect the interests of the public better than they are protected by the system of external control? The answer to such questions may depend upon two main factors: the extent of the control over the directorate by virtue of stock ownership, and the ability and honesty of the persons selected by the Government to act as directors. It must always be remembered, moreover, that external control through law and ordinance can be employed if other methods are not satisfactory.

The operations of some of the great German cartels in the world market are highly significant, in that they make the state itself a factor in production and distribution, purchase and exchange, throughout the world. Not merely control by the Reich or other public unit brings this about, but actual share-holding. The relation between foreign policy in general and economic policy thus becomes increasingly close, with possible future results which cannot be predicted, but which must be of the very greatest importance.

From the standpoint of economic theory, the most interesting feature of the German policy is its complete abandonment of the attempt to enforce

competition, and its recognition of the principle of coöperation. Although the Cartel Law protects the individual business man from the unfair methods which monopolies so often employ to force out the small entrepreneur, it recognizes and permits monopoly organization, always under public control. In certain cases all individual enterprises are compelled by law to enter syndicates. The principle of competition has disappeared from public economic policy. Germany has quite definitely decided that unrestricted *laissez faire* is impossible in the modern economic world; that large scale production is necessary and systematic coöperation beneficial, under proper conditions; and that a well coördinated, efficient, truly social-economic system can result only from a very large amount of state participation in industry at strategic points, and state control all along the line.

Public Encouragement of Monopoly in the Utility Industries

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It is not the purpose of this brief article to discuss the soundness of the theory that industries which bear a peculiar relation to the public interest render more satisfactory service to their patrons if protected by the Government from competition. Nor is this the place to consider whether the present regulatory practices of the American states give the patron of the utility that assurance of value in return for price which is supposed to result when different groups are competing for a market. The intent of the following pages is to point out, in a general way, and with occasional illustrations what steps are taken and what things are done by the American states to create and foster monopolistic conditions in an industry which the courts hold to be "affected with a public interest."

The granting of exclusive franchises by the state legislature, however usual in the past, is no longer a common practice. The rôle of the local or municipal franchise in the creation and the furtherance of public service monopolies has been the subject of frequent and incisive scrutiny. No attention will be given here to these means of curtailing competition between utilities. The present article will concern itself with the devices by which the state public service commissions foster monopoly and with the statutes which direct the commissions toward that end.

Approval of Incorporation

The voice of the public service commission, as to whether there shall be competition or monopoly in the public service, is first heard when a person or corporation undertakes to venture into a quasi-public activity. In a few states—Maine, Vermont and Pennsylvania, for example—the approval of the public service commission must be obtained before any public service corporation can be formed. Before the articles of incorporation are submitted to the secretary of state in Vermont, the Public Service Commission must "determine whether the establishment and maintenance of such corporation will promote the general good of the state." In order to determine whether the existence of an additional utility corporation will "promote the general good of the state," it is, of course, proper to inquire whether the proposed corporation would enter into competition with an existing operator, and whether any competition which would result would serve the public interest.

Certificate of Convenience and Necessity

A more familiar form of control, exercised at the very origin of competition, is the power of the commission to grant or refuse a certificate of convenience and necessity. It is a very common provision in state statutes that, until the public utility regulatory body gives its approval, no person or corporation may "begin the construction" of its plant, system or route; begin to "operate"; "transact any business"; or "exercise any franchise or right under any provision of the law." In determining whether or not to give its approval to the new public service project, the commission must find

whether it will serve the "public convenience and necessity." An accurate statement of just what utility enterprises must obtain the certificate of convenience and necessity in the various states could be made only after a careful study. It may be said, however, that in one state or another, certificates must be obtained by operators of steam and electric railways, sleeping cars, baggage and express services, motor common carriage, carriage by water, public water supply service, pipe lines, air transportation services, radio broadcasting, toll bridges, wharves, elevators, warehouses, stockyards, telegraphs, telephones, electric light and power, gas, steam heating, refrigeration and sewage disposal. In no one state is the certificate required for all of these enterprises, and in some states it is required for only a few. Nevertheless, in most of the industrial states—New Jersey, Pennsylvania and Illinois are good examples—the certificate is required of a wide range of utilities.

In deciding whether or not the instituting of a new service would serve the public convenience and necessity, no factor is more frequently the determinant than the question of whether the existing utility ought to be subjected to competition. Indeed, this would seem to be the major, if not the sole, consideration in some states which require no certificate for entrance into areas where there is no established service, but which do require a certificate in case the new enterprise should compete with an existing utility.

It is, of course, no easy task for the commission to decide whether the public interest will be best served by the additional facilities offered by the proposed new utility, or whether the public will profit more from the presence of an industry enjoying the financial stability which results from a protected monopoly. Few rules have been laid down and perhaps none of these is of universal application. The California Railroad Commission, early in its history, announced that utilities furnishing power and light in that state would not be subjected to competition if they were furnishing satisfactory service at reasonable rates. When the existing company proved unwilling or unable to satisfy this requirement, competing companies would be admitted.[1] This rule has been followed by a number of other states when dealing with electric companies.[2]

Other state commissions, however, have indicated that they will attempt to obtain an improvement in the service and rate schedule of the established electric company before admitting a competitor. At least two commissions, those of Missouri and Maine, have gone much further than this. A Missouri case will illustrate. A petition was before the regulatory commission of that state, asking for the grant of a certificate of convenience and necessity to permit the applicants to construct and operate an electric light and power plant and distributing system in a city which was already being supplied with electric service. The existing service was notoriously bad. The Public Service Commission had, on at least two previous occasions, ordered improvements in plant and operating practices, but without securing any considerable improvement. Popular opinion in the city, as indicated by the vote in a special election, was strongly in favor of permitting the petitioners to construct plant and wires in competition with the established company. The Commis-

[1] *Pacific Gas & Electric Co.* v. *Great Western Power Co.*, 1 Calif. R. R. Com. Reps. 203 (1912).

[2] Probably primarily in the western states. For support of the California Commission by an eastern state, see *Re Thompson* (Vermont), P. U. R. (1916) E, 232. Citations to P. U. R. refer to *Public Utilities Reports*.

sion, convinced that the public interest required the admission of the new company, still sought to avoid a duplication of equipment and the ineconomies of competition. A certificate was granted to the petitioners, but only on condition that they

> purchase the plant and equipment of the existing company at such price as can be agreed upon by the parties, or, on failure to agree, at such price as shall be fixed by the Commission. Therefore, the applicant will be required to file a written offer with the Commission and with the Greenfield Light and Power Company [the existing company] on or before the effective date of the order herein offering to take over and pay for the property and equipment of the company used and useful in rendering service at Greenfield at the fair physical value thereof as a plant in operation to be fixed by the Commission. If within five days after receipt of such offer the Greenfield Light and Power Company shall file its written acceptance of such offer with the Commission and the applicant herein, the Commission will direct its engineers to inventory and appraise such property, and the Commission will thereupon fix the fair physical value thereof to be paid by the applicant.[3]

The Commission did not state what it would do in case the existing company should refuse to sell.

In the case of telephones, where the inconveniences of separate systems are, no doubt, greater than in the case of light and power, it is sufficient in perhaps no state for the one seeking a certificate to show that the existing service is unsatisfactory or too costly. It must be shown, also, that the established company is incapable of improving its service. If an electric company would retain exclusive control of its territory it must, according to the California Commission, be always on good behavior. A telephone company, however, may rest on its oars, secure in the knowledge that before a competitor is allowed to enter, the commission will attempt to compel an improvement in its own service.[4]

There has been much less uniformity among the states, and much less consistency on the part of individual commissions, when considering applications to enter into competitive transportation service. New York furnishes an excellent example. In 1907, the regulatory commission refused a certificate of convenience and necessity for the operation of an inter-urban electric railway, offering as its reason for so doing that the cities and rural area in question were adequately served by existing steam carriers. On review of the action of the Commission, the Appellate Division of the state Supreme Court reversed the order and instructed the Commission to issue a certificate. The Court saw in the network of rails, which was already in use, evidence that it was the policy of the state to permit electric lines to parallel steam lines, even though the latter were furnishing adequate service.[5] The advent of the motor bus, however, found the New York courts ready to accept a different view of the relation of competition to public convenience and necessity. The present attitude of Commission and judiciary is expressed in a recent Commission opinion:

> The courts and this Commission have consistently held that a certificate will not be granted [to a motor bus company] where the route competes with an existing transportation service and that existing transportation service furnishes adequate means of transportation.[6]

Where an application for a certificate of convenience and necessity is opposed, on the ground that the proposed operations would result in competition injurious to the service furnished by an established utility, the commission is presented with a very complicated question of fact. The extent to which an industry, not yet in operation, will detract patrons from an established business, is not subject to easy or accurate measurement. Nor is it a simple matter, once the extent of the competition is estimated, to determine whether the loss of patrons by the existing utility will so reduce its income as to prove subversive of the public interest. In very few cases, indeed, does it appear that the public service commission makes any effort, through its own staff, to uncover the data indicating the nature and the extent of the competition which would result from the granting of the certificate. It is the custom, rather, to depend on the counsel for the contending parties to disclose the evidence upon which the order of the commission will depend. In some cases the attorneys submit in testimony and in exhibits very comprehensive statistical analyses.[7] An examination of briefs, exhibits and minutes of testimony filed with a great number of cases decided by the New York Public Service Commission indicates, however, that the counsel all too often attempts to establish its petition or opposition by offering in testimony the opinion of parties interested in the operation or service of the contending utilities. Not infrequently these opinions are in such conflict that the order of the Commission represents little more than guess.

The foregoing pages have been concerned with the maintenance of exclusive or monopolistic control over service in a particular area, or over a specified route. The public service commission, in determining whether or not to issue a certificate of convenience and necessity, has also in many cases to decide whether it will encourage the creation of a large unified system serving many localities, or whether it will give preference to small concerns, each dominant in its own limited territory. This choice between policies is perhaps most often forced upon the commission when it is faced by two applicants for a certificate to enter a territory not already preëmpted by a utility. If only one of the two petitioners is to receive a certificate, the commission will ordinarily grant it to the one of the applicants thought to promise the better service to the public. As a consequence the large corporation, with its more specialized equipment and its greater reserves, usually receives the commission's approval. This is especially true of the telephone industry, since the large system can furnish connections with other localities which are not possible to the small and independent company.[8]

Control Over Capitalization

Public service commissions occasionally use their control over utility capitalization as a means of limiting competition between public service companies. In most of the states, the statutes which give the commission its

[3] *Re Ward*, P. U. R. (1922) D, 727, 733–34. For a similar decision by the Maine Commission see *Re Turner Light & Power Co.*, P. U. R. (1916) A, 418. After stating that "if practicable" an effort ought to be made to compel the established electric company to improve its service or lower its rates before permitting another company to offer competition, the Maine Commission issued a certificate to the applicants, subject to the condition that they purchase certain property from the established utility.

[4] See, for example, *Wayne County Mutual Telephone Co.* v. *Commercial Telephone & Telegraph Co.* (Illinois), P. U. R. (1915) E, 673.

[5] *In re Rochester, C., E., Traction Co.*, 118 App. Div. 521, 102 N. Y. S. 1112 (1907).

[6] *Re Cooper*, Rep. N. Y. P. S. Com. (1927) I, 453, 456.

[7] See, for example, *Re A. R. G. Bus Co.* (California), P. U. R. (1919) E, 232.

[8] For an illustrative case see *Re Coles County Telephone and Telegraph Co.* (Illinois), P. U. R. (1918) A, 558.

authority over security issues list the purposes for which securities may be issued. Prevention of competition is rarely, if ever, included in the list. These provisions are usually interpreted to require the commission to approve any issue made in proper form which is for one of the purposes enumerated in the statute. Where this is true, it is very hard to see how authority to make an issue can be refused on the ground that the proceeds are to be devoted to a project which ought to be discouraged because it would unduly compete with another utility. Thus, the Indiana Public Service Commission, after refusing a certificate of convenience and necessity for the establishment of a telephone exchange on the ground that it would compete with an existing system, was none the less forced to approve the issuance of securities by which the company expected to realize the capital to establish that very exchange.[9] On a later occasion, the Indiana Commission did refuse to approve an issue by a lighting company, offering as its reason that the proceeds were for an undesirable duplication of the system of a competing company. This interpretation of the Commission's authority was rejected by the Supreme Court of the state when it approved a mandamus instructing the Commission to authorize the issue. The Court stated that it was not the duty of the regulatory body to inquire whether the income from the issue was to be invested in a way to best serve the public good. The statute intended merely for the Commission to inquire whether the proposal for the issue was presented in proper form, and whether the money was to be invested for one of the purposes enumerated in the statute.[10]

In a few of the states, the discretion of the commission to refuse to permit the issuance of securities is not so strictly limited. Some statutes—for instance, those of New Jersey and North Dakota—merely state that no securities may be issued without the approval of the public service commission, no indication being given as to what are proper grounds for refusal. The Alabama Commission is to give its approval to an issue only if it finds that the purpose for which the money is to be spent is "compatible with the public interest."[11]

In the states where the authority of the commission over capitalization is granted in very broad terms, or has been loosely construed, there has been some evidence that this power will be used to curb what the commission believes to be undesirable competition. This is illustrated by at least one order of the Michigan Public Utilities Commission. Two competing motor bus operators having applied to the Commission for approval of articles of incorporation and for permission to issue securities, this body inquired very carefully into the business conduct of the applicants, and learned that they were engaged in bitter competition. After describing these competitive practices of the two operators in its written opinion, the Commission expressed regret that it did not have power to dispose of the less desirable of the two by denying it a certificate of convenience and necessity. It achieved the same end, however, by allowing only one of the applicants to make a capital issue, the rejection of the other petition being put on the ground that, under the present conditions of operation, the securities would represent a very questionable investment to purchasers.[12] The New Jersey Board of Public Utility Commissioners has been even more frank in using its control over capitalization to foster monopolistic conditions. It should be noted that this is done not so much on the ground that consumers receive better service when one operator dominates the field, as on the ground that the probable earnings of the company would not assure to the investors the return which they had anticipated. An illustration can be found in a comparatively recent case, in which the Board refused to authorize the issue from which an electric concern intended to finance a lighting and power project in an area already occupied by another company. In the course of the opinion, it was said:

> The question to be determined by the Board is whether the approval of the "purpose" of such stock issue by the applicant will result in a supply of electrical energy under the best conditions and at the lowest rates which will assure a continuity of service. . . .
>
> It is the duty of this Board to pass not only upon the legality of a financial proposition advanced but upon the merits of the subject matter itself from the standpoint of a wise public policy, having for its object the safeguarding of the public against ill-considered and reckless financial ventures, the securities of which might entail loss on the public investing therein.[13]

[9] *Re Farmer's and Merchant's Coöperative Telephone Co.* (Indiana), P. U. R. (1915) B, 55. See also *Re Peoples' Telephone Co.* (Nebraska), P. U. R. (1915) D, 160; and *In re Mahoning County Light Co.* (Ohio), P. U. R. (1915) A, 74.

[10] *Public Service Commission of Indiana* v. *State ex rel. Merchants' Heat & Light Co.*, 184 Ind. 273, 111 N. E. 10 (1916). For a similar interpretation of the New York statute, see *People ex rel. Long Acre Electric Light & Power Co.* v. *Public Service Commission*, 137 App. Div. 810, 122 N. Y. S. 641 (1910).

[11] The constitutionality of this very general provision was asserted by the state Supreme Court in *Alabama Public Service Commission* v. *Mobile Gas Co.*, 213 Ala. 50, 104 So. 538 (1925). A similar grant of authority in the New Hampshire statute seems to have been interpreted to allow very little discretion to the Commission. *Re Concord Gas Light Co.*, P. U. R. (1921) C, 169.

[12] *Re Himburg*, P. U. R. (1922) C, 440.

[13] *Re Community Power & Light Co.*, P. U. R. (1926) A, 536, 543.

CONSOLIDATION, MERGER AND SALE

Probably no regulatory power of the public service commission has received less attention from writers than the authority to supervise the transfer and the combination of public utility property.[14] The primary objectives of public utility regulation, the assurance of satisfactory service at fair rates and the protection of the investor, doubtless seem to a great many people too far removed to be causes for concern as to the identity and the corporate structure of the owning interests. Consequently, it is not surprising to learn that the legislative enactments of the forty-eight states reveal no common attitude concerning the desirability of concentration of control over utilities, whether competing in the same or serving widely separated territories.

In some of the states—Oregon, Florida and Vermont are examples—all utilities other than railroads are virtually free to purchase, sell and combine as they see fit.[15] Motor buses, subject to regulation as to rates and service in nearly every state, are in many states entirely uncontrolled as to consolidation, merger and sale. Some legislatures are willing for scattered holdings to be collected under one management, but forbid the combination of competing utilities. This is true of railroads in a great number of states, and of telephones and telegraphs in Pennsylvania.[16] Still other states take quite a different position. Thus, the Indiana and the Alabama statutes

[14] A recent article by W. M. Wherry, entitled "Principles Applicable to Consolidation and Merger of Public Utilities," appeared in *New York Univ. Law Rev.*, 6: 143 (1929).

[15] But see *Re Union County Telephone Co.* (Oregon), P. U. R. (1920) C, 1002.

[16] Constitution of Pennsylvania, Article XVI, Section 12, and *Cochranton Telephone Co.* v. *Petroleum Telephone Co.*, 263 Pa. 506, 107 Atl. 23 (1919).

encourage the consolidation of any railroads which could be operated as a single system.

Still other legislative enactments—and, if we omit railroads from consideration, a number of states are included in this category—make no pronouncement of policy, but give the regulatory commissions a free hand to formulate and carry out their own ideas as to transfer and coördination of utility property. Perhaps in no other phase of regulatory activity is the grant of power to the commission made in such unqualified fashion as one finds in some of the provisions conferring control over consolidation, merger and sale. In view of the care with which the statutes enumerate the purposes for which securities may be issued, one wonders at the lack of assurances that the commission will not go beyond the proper bounds of public authority in regulating ownership and control.

Apparently very few commission orders concerning consolidation, merger and sale have gone to the courts for review. Accordingly, one must depend almost altogether upon the opinions of the commissions themselves for interpretations as to the extent of administrative authority under these broad and unqualified grants of power. The conviction that competition for the same patronage means the very defeat of satisfactory public service is expressed in a number of opinions, the following being representative:

> This Department has, at all times, encouraged the consolidation of all utilities rendering the same kind of service and serving the same city, town or community in this state, and we believe that consolidation should be effected wherever possible. . . .
>
> There is no power vested in this Department, nor any other state department, whereby it could by order or otherwise direct a consolidation, however much it might desire to do so. Lacking the power to order, all we can do is to recommend; and we do respectfully recommend that the city commissioners and the companies enter upon negotiations with a view to accomplishing this desired result.[17]

Like the Washington Department in the above quotation, a number of commissions have pointed out that they possess no authority to order a consolidation of competing properties, a source of regret to at least one commission.[18] But, while the commissions may not order the sale or consolidation of utilities, they may lend their influence, and perhaps a bit of pressure, to induce an arrangement which would terminate subversive competitive practices.[19] Perhaps the strongest evidence that the regulatory authorities are convinced of the desirability of monopoly control over service in any locality lies in the fact that there are in the published cases so few instances in which a commission has disapproved of the consolidation of competing companies.

It is not so easy a matter to convince the public service commission that it should approve a sale, consolidation or merger when the purpose is to unite non-competing properties into one large system. As the statutes now read, there is very little specification as to what factors should determine the order of the commission's allowing or refusing to allow the petition to purchase, merge or consolidate. The Maryland Commission for a time refused to approve of any transfers of

[17] The Washington Department of Public Works, in *City of Spokane* v. *Washington Water Power Co.*, P. U. R. (1921) D, 762, 772, 773.

[18] The Nebraska Commission in *Blackledge* v. *Farmers' Independent Telephone Co.*, P. U. R. (1919) D, 211, 224. The Commission expressed the opinion that it would not be unconstitutional for the legislature to confer upon the Public Service Commission authority to order consolidations.

[19] See the Illinois case of *Rockton Electric Co.* v. *South Beloit Water, Gas & Electric Co.*, discussed below and cited in note 29.

utility plants or systems, except upon affirmative evidence showing that the public, as well as the applicants, would realize positive benefit from the change of ownership or management. This policy finally went to the courts for review in 1928. In refusing one electric company permission to purchase four other electric utilities, the Commission stated that the reasons advanced by the petitioner as justifying the approval of their project did not

> seem sufficient, in the view of the Commission, to justify it in granting the privileges sought in the application. It cannot see wherein the public will be benefited in the slightest degree. . . . The only consideration seems to be one of financial investment, the only persons to be really benefited being the seller and the purchaser. This Commission can see no advantage whatever to the public in the proposed transaction and the application is, therefore, denied.[20]

This order, refusing approval of the proposed purchase and sale, was immediately taken to the courts for review. It was argued that the intent of the statute was that the Commission should always give its approval to applications for purchase and sale, unless it should appear that the transfer of ownership would prove detrimental to the public interest. There was nothing in the statute to guide the court. There was no provision that the Commission should give reasons for its order approving or refusing approval of the project of the applicants. The law merely stated that no sale of utility property should be made "without the written consent of the Commission." The court, without giving any particular attention to the constitutionality of the statute, decided that the Commission had exceeded its authority in withholding its approval for lack of proof that the public would benefit from the proposed transaction. The exact reason for so deciding was not given by the court, but it announced the opinion that permission to a transfer could be refused by the Commission only on a finding that the transaction would be detrimental to the public.[21] The effect of this decision remains to be seen. The New York Public Service Commission has announced that it will ignore the decision of the Maryland court and will continue to refuse its approval to consolidations of utility properties, except on affirmative evidence that the public will benefit by the proposed change. The Maine Commission, in a decision and opinion of June, 1929, intimates that it will follow the New York, rather than the Maryland, rule.[22]

For the most part, the commissions seem to be quite ready to give consent to the sale and the merging of non-competing utilities. An illustration of this willingness to acquiesce in the concentration of control in the hands of a few large corporations is found in some recent words of the New Jersey Board of Public Utility Commissioners:

> The merger of smaller electric light and gas companies into larger units appears to be in accordance with the trend of the times and should result in more economical operation and consequent benefit to the public. Furthermore the interconnection of the group of properties as proposed is a

[20] *Re Electric Public Utilities Co.*, P. U. R. (1927) E, 609, 616. The California and Pennsylvania Commissions appear to have acted upon the same understanding of their duties in *Re Greer* (California), P. U. R. (1922) B, 49, and *Re Lawrence Hydro-Electric Co.* (Pennsylvania), P. U. R. (1927) C, 78.

[21] *Electric Public Utilities Co.* v. *West*, 140 Atl. 840 (1928).

[22] *Re Consolidated Gas Co. of New York* (New York), P. U. R. (1928) E, 19, 35; and *Re Eastport Water Co.* (Maine), P. U. R. (1929) E, 136, 157–58.

logical step in the development of any super-power system.[23]

On the other hand, there have been a number of cases in which the commissions were convinced that the public stood to lose in service or rates if the proposal for a combination of non-competing properties should be permitted. Two cases will illustrate. The Indiana Public Service Commission was faced by the application of a group of bankers and lawyers to purchase three small telephone systems. While the three properties were neighboring and would lend themselves to unification, there was ample proof in the evidence before the Commission that the applicants were interested purely in the exploitation of the property and not in supplying a service. In refusing to allow the purchase, the Indiana Commission, noted for speaking in clear and forceful language, announced a policy of telephone control which would extend much beyond the immediate application before them.

> The real owners of the properties will not be the executive officers, or the people of the community, but will be the holders of the securities, perhaps many of whom reside in distant states, and who will neither know nor care as to the quality of service rendered so long as the interest on their investments is promptly paid. . . .
>
> The history of the telephone industry does not disclose that the consolidation of plants widely scattered when brought under one unified management renders the service any cheaper or more efficient. . . .
>
> It may be that we have reached a place in the telephone history of the country when the small telephone systems must pass out of the picture, and that there should be substituted therefor large telephone corporations consolidating all the small companies and operating through subsidiary companies, but this Commission is not yet ready to embrace this theory. If such consolidation is required by the needs of any particular community, it must be done by experienced operators, on a reasonable value and sound financial basis.[24]

The Pennsylvania Commission announced a not dissimilar policy in respect to efforts to buy up and to consolidate scattered water companies. After assuring the applicants that it was not inimical to the current trend toward centralized control, the Commission went on to say:

> But in this instance, however, the Commission is strongly of the opinion that there is absence of economic reason, under such conditions as are presented in these applications, for the merging into one company of widely separated, and physically uncoördinated water utilities in various parts of the state. There is material difference between water companies and other public utilities. For instance, it is obvious that it is not only advisable but absolutely necessary for the development of the electric industry and the service of the public to effectuate consolidations of electric companies when the circumstances are such as will result in betterment of service or reduction of rates. In the case of other utilities, similar conditions favorably affect consolidation. But the Commission fails to see, at least under such facts and circumstances as are presented in these applications, how it is possible to coördinate public service, or effect any substantial economic advantages, in tying together widely separated water companies which cannot possibly have any physical interconnection, and which have little or no corporate, financial or community relationship. The supply and service of water is, in the experience of communities large and small, a peculiarly localized function and necessity, and conditions of ownership, management, finances and service vary to a degree which is not nearly so marked among other public utilities.[25]

[23] *Re Jersey Central Power & Light Co.*, P. U. R. (1925) D, 699, 701.

[24] *Re Associated Telephone Co.*, P. U. R. (1927) C, 577, 584, 585, 586.

[25] *Re Pennsylvania Water Service Co.*, P. U. R. (1927) E, 656, 664–65. For a comprehensive statement of the attitude of the Maine Public Utilities Commission toward consolidation of various kinds of utilities, see *Re Eastport Water Co.*, cited in note 22.

CONTROL OVER UTILITY SERVICE

The authority of the public service commission to require utilities to furnish adequate and convenient service ordinarily includes the power to pass upon the advisability of extensions of lines or system into new territory.

It is quite common to find in statutes that a utility may not extend its service into an area which it had not previously elected to serve, except with the consent of the public service commission. This consent or approval, if given, usually takes the form of a certificate of convenience and necessity, more properly considered in an earlier section of this article. In Wisconsin, however, the control of the Commission over extensions of telephone lines is more inclusive than that ordinarily contemplated in the power to issue or refuse a certificate of convenience and necessity. The legislature of that state, through the enactment of an anti-duplication law, announced very definitely a state policy against competition between telephones. The Railroad Commission was given very thoroughgoing control over extensions of lines and the tapping of districts not previously served. In the exercise of its duty to prevent competition, the Wisconsin Commission is often called upon to hear the pettiest of controversies between telephone companies. The following not unrepresentative cases will illustrate. An individual living in the village of Hubbard expressed a desire for the service of the Hubbard Farmers Telephone Company in preference to that of another company which was operating in the same village. The reasons for this choice were, first, that he was a stockholder in the Hubbard Company and, second, that the competing company had, at a previous date, aggrieved him by refusing to run a wire to his farm house. But, in the present case the Hubbard Company, which he preferred, could instal service only by running a wire some ten or fifteen yards from the main line to his house. The competing company's wires, on the other hand, ran directly in front of his door. An appeal was made to the Railroad Commission to determine whether the preferred company should be permitted to make this short penetration into the territory of its competitor.[26]

Another problem coming before the Wisconsin Commission involved the territorial rights of two telephone companies having their lines about equidistant from a farm house over which they were in dispute. One of the companies had furnished service to a previous occupant of this house, but on the vacating of the premises the instrument was taken out. The new occupant sought and obtained service from the competing company. In running its wires up to the house, this telephone company made use of the same poles which had been used by its competitor in serving the previous occupant. The company which had previously furnished the service then came before the Railroad Commission, arguing that its territory had been invaded and urging that the duty of the Commission to prohibit uneconomical competition between telephone companies required an order ousting its competitor from the extension.[27]

[26] *Re Hubbard Farmers Telephone Co.*, P. U. R. (1916) C, 435. The Commission refused to allow the extension.

[27] *Wonewock Telephone Co.* v. *La Salle Telephone Co.*, P. U. R. (1915) C, 740. The Commission refused to oust the defendant. For a case in which the Wisconsin Commission ordered the abandonment of an extension, on the ground that it was an invasion of the territory of a competitor, see *In re Grange Hall Farmers' Telephone Co.*, P. U. R. (1915) E, 594.

Excepting the control of the Wisconsin Railroad Commission over duplication of telephone systems, one finds very little evidence that the state regulatory bodies use their power to control service as a means of fostering monopolistic conditions among public utilities. Occasionally a commission, hearing a complaint from a public service company that a competitor has invaded its territory without a certificate of convenience and necessity, orders the interloper to abandon its new project.[28] The Illinois Commission on one occasion, when faced by such a situation, directed the complainant to take over the wires of the invading company. This order was opposed by the invader, on the ground, among others, that the complainant was not in a position to furnish adequate and satisfactory service throughout the territory it was claiming as its own. In reply to this charge, the Commission announced that if this allegation proved to be true, it would not only require the complainant to surrender the property which it was here directed to take over, but it would entertain application by its competitor for a certificate "authorizing it to take over and operate the whole of the distribution system" in the disputed territory.[29]

CONCLUSION

The present article will doubtless seem incomplete if it closes without some effort to indicate the relative importance of legislative and commission policy in the encouragement of monopolistic conditions among utilities. Any effort to appraise the influence of the various devices above described for curtailing public service competition ought to be predicated upon a much more careful study of statutes, court decisions, commission orders and utility practice than the writer has attempted. The foregoing pages must be accepted as a crude sketch, intended to inform the layman of the existence of a very important, but much overlooked, form of social planning.

[28] A case is *Northern Illinois Telephone Co.* v. *Farmers' Telephone Co. of Sandwich* (Illinois), P. U. R. (1916) E, 1090. In *California-Oregon Power Co.* v. *Keno Power Co.*, P. U. R. (1918) D, 851, the Oregon Commission denied that it possessed such authority. See, also, *Lakewood & Coast Electric Co.* v. *Atlantic Coast Electric Light Co.* (New Jersey), P. U. R. (1917) A, 695.

[29] *Rockton Electric Co.* v. *South Beloit Water, Gas & Electric Co.*, P. U. R. (1921) E, 17. The Commission did not discuss its statutory power to make such orders.

Who Shall Administer the Anti-Trust Laws?

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TWO important movements, now under way, may shortly prove of vital interest to every American: the strengthening of court organization to produce quicker, more accurate justice; and the reorganization of business into larger, more effective units.

These two separate movements impinge at a point which is the subject of this paper. Hitherto we have taken for granted that, of course, the administration of the anti-trust laws was a matter for the courts. The judge, on his part, has usually sought to express the ideas of the law-maker. If these ideas were not clear or were impossible of fulfilment, the judge's duty has forced him into a bog of socio-economic reasoning and theorizing which can be neither helpful to the interests concerned nor welcome to the courts themselves. Such is the present status of our laws on trade combinations at a moment when the greatest consolidations in our history seem about to take place. In deciding whether or not a change in enforcement is necessary, we shall be influenced by three outstanding features of our present methods.

INDEFINITENESS OF THE LAW

The first is the almost incoherent vagueness of some of these laws. Here one meets with: "restraint of trade"; "monopoly"; "unfair competition"; "tend to create a monopoly"; "price discrimination"; "such injunctions" —"such" presumably referring to a lengthy and highly ambiguous preceding paragraph of the (Clayton) Law on labor disputes.

Some hold that such indefiniteness is admirable, in that it allows the courts to develop the law with greater elasticity and freedom. We shall presently examine a few decisions to see if this be true. One thing stands out in all this mass of vitally important laws; they are not clear, yet they go to the root of the most important business activities of our people. It has been well said that an interpretation might fairly be given to the present trade laws which would render illegal the existence of over twelve hundred of the largest and most potential companies in American business.

Whether the economic and social aims of these laws are right or wrong, is not the question. Whether right or wrong, these aims are impossible of fulfilment without reasonable clarity of expression in the laws themselves or lacking some administrative authority which, by making supplementary rulings and decisions, could speedily clear up doubtful points.

In relying on the courts for the enforcement of our trade laws, couched in these vague terms, we have also to reckon with the jury box. If it be hard, nay, impossible, for our highest court to reach unanimity in the opinions of its justices, how can we expect a jury to apply the law?

Several huge packing corporations form a company which distributes packing-house products in many large cities. This combination is attacked by the Government and is charged with having manipulated prices of meat products upward, through the suppression of competition. At the trial, the Government submits telegrams from the central office to local branches of

the combination, ordering that meat prices be kept up or raised. One such telegram pointedly asks a local agent of the combine who had lowered his prices: "Are you holding a fire sale?" The case looks dark for the defense. But who are the defendants? Here they sit in the court room, highly respectable officers of large companies, pillars of state and society. Shall they go to jail, or perhaps pay a heavy fine? By the way, what is "restraint of trade"? The jury of farmers decides, "Not guilty."

Or, let us take a civil case. A great fruit company is sued by a small competitor for damages under the Sherman Act. The latter charges that by coercion, trade intimidation and divers unfair and illicit practices, its huge rival has driven it out of the fruit business, destroying both its sources of supply and its markets. It claims fifteen million dollars in damages under the Law. Before a Federal jury of high-class men the legal battle is bitterly waged for three months. The evidence presented by the ruined company is most impressive. Legal arguments are lengthy and involved. The jury can find no violation of the Law by the large company.

Said a prosperous business man, a member of the jury, to the writer: "We were so dazed by the deluge of evidence and the *uncertainty of the term, 'restraint of trade,'* that we had to find for the defendant."

After nearly forty years upon the statute book, the foundation principle of our anti-combination laws is not clear to courts or juries.

There is a second question which will strongly influence our decision, viz., the nature of the problems arising under these laws.

Let us choose a few important cases in the fields of business consolidations, retail prices and labor disputes and ask in each case: What was the real question which the court was called upon to decide? Is this question one which can be best solved by a court?

In the first anti-trust case the question was: Can competing railways agree with each other to charge the same freight rates for hauls between the same cities? The layman naturally asks: What else could they do? But the Law declares: "Every agreement . . . in restraint of trade" is illegal. The court had to point out that no matter how reasonable the agreement might be, if it suppressed competition it was a "restraint." The Law had been violated.[1]

Later, in the oil and tobacco cases, the court felt obliged to say that only agreements in "unreasonable" restraint of trade were illegal.

Can two competing railways, the Great Northern and the Northern Pacific, be purchased by a single holding company, and their ownership thus be brought under a single control? Not a train on either road is dropped from the schedule; not a single freight or passenger office closed; not a rate raised. But, said the court, while there may be no actual suppression of competition, there is a possibility of it. "Potential" restraint of trade makes the consolidation illegal. Incidentally, what is "potential restraint"?[2]

Can a large steel company buy an important competitor, acquire immense bodies of iron ore, fleets of steamers, selling agencies, and so forth, without becoming an illegal monopoly? Said the court, in substance: some of the practices formerly followed by the Steel Corporation were probably illegal, but have long since been abandoned. It has never sought a monopoly of the steel trade, but has steadfastly allowed its competitors to retain a large share of the business. The vote of the justices was four to three on this decision.[3] What is the test of a "monopoly"?

[1] *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897).

[2] *Northern Securities Co.* v. *U. S.*, 193 U. S. 197 (1904).

RETAIL PRICES

So much for mergers and consolidations. Let us now glance at retail prices. Most large manufacturers try to protect their widely advertised products from the price-cutting of retailers because such price-cutting soon destroys the market for the goods. Other retailers refuse to handle them.

Can a soap manufacturer send to dealers a list of retail prices for his soaps and perfumes and ask them not to cut retail prices below this list? Can he intimate to the dealers that he prefers strongly to distribute his products through dealers who will observe this request? The court held that this was not an agreement in restraint of trade. It was merely a request, which was far from being an agreement.[4]

If this be so, cannot a manufacturer of valves and valve stems for pneumatic tires arrange with his distributors to sell only to those who observe his list of retail prices? Those who wish to deal in his goods must consent to abide by these prices in selling to the public. Said the court, here there is a definite agreement to suppress competition in retail price. This agreement is an illegal restraint of trade.[5] Exactly what is the difference between an "agreement" and a "request"?

PRODUCERS' PROFITS

Can a group of pottery manufacturers, finding that competition is forcing them to ruinous price fluctuations, agree among themselves to charge to the trade certain scales of prices, taking utmost precautions, however, that these prices shall be *reasonable?* Is this an unreasonable restraint of trade? The court held that an agreement between competitors to fix prices was an agreement to suppress competition and, hence, an illegal restraint of trade.[6]

Can a lumber trade association agree that its members shall send to the central office full information about their stocks on hand, the prices which they charge, and so forth, and receive, in return, a digest of this information covering their entire competitive district? This digest is accompanied by an association letter, exhorting them to keep up prices and keep down production. The result is that prices are vigorously increased. The court answers: illegal. An agreement to furnish information to be used in suppressing price competition is an agreement in restraint of trade.[7]

Does this mean that all efforts of trade associations to inform their members as to stocks, grades and qualities, market prices and trade prospects are illegal? Can a lumber association, by resolution, send such information to its members, provided it is not accompanied by an organized price-boosting campaign? The court answered it may legally do so, if the arrangement is not in either purpose or effect a method of suppressing competition.[8]

Can a group of manufacturers of cast iron pipe agree to keep up a show of public competition in supplying city governments, by making separate bids for contracts, but in reality suppressing

[3] *U. S. Steel Corporation*, 251 U. S. 417 (1920).

[4] *U. S.* v. *Colgate & Co.*, 250 U. S. 300 (1919).

[5] *U. S.* v. *Schrader Sons Co.*, 252 U. S. 85 (1920).

[6] *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927).

[7] *American Column and Lumber Co.* v. *U. S.*, 257 U. S. 337 (1921).

[8] *Maple Flooring Mfrs. Assn.* v. *U. S.*, 268 U. S. 563 (1925).

competition by determining secretly in advance which company shall be the successful low bidder on each contract? In each supposed competition the man picked in advance by the combination bid low, while the others purposely bid higher. The business was thus distributed among the bidders to the profit of all. The court held this to be a combination for the purpose of suppressing competition and, therefore, a restraint of trade.[9]

ORGANIZED LABOR

Let us now glance at a few of the attempts of labor unions to place a taboo upon the products of manufacturers of whom they disapprove.

Can a group of contractors, manufacturers and labor unions agree among themselves that they will deal only with each other, that is, that the manufacturers will employ only members of the union, and that no non-union millwork shall be used by members of the combination? Such non-union millwork was made almost wholly in Wisconsin and the South. The court held this to be a combination to exclude from Chicago the products of manufacturers located outside of Illinois, and thus an agreement to restrain trade between the states.[10]

Almost immediately the court was called on to decide a more difficult problem in the same field. The Journeymen Stonecutters Association laid a taboo upon the products of the Indiana Limestone Producers. This taboo was nation-wide and forbade members of the union to work on limestone from the Indiana quarries of the companies named, *wherever it might be found.* Was this an agreement in violation of the Federal Law, or was it, as the union urged, simply a combined refusal to work upon the products of stone producers of whom the union disapproved? The court, by a majority vote, held that the agreement was a combination designed to prevent the circulation of Indiana limestone, and hence to restrain trade in that product among the states.[11]

We need only mention the Duplex Printing Machine case, in which the Supreme Court was asked to hold that the Clayton Act forbade any Federal court to grant an injunction against organized efforts to force outsiders to aid a union in its fight against a printing machine company.

The Clayton Act, with much excess verbiage of doubtful meaning, had declared that injunctions should not be issued in "such disputes" between parties to the dispute. The court held that outsiders were not parties to the dispute, and hence were entitled to the ordinary protection of the trade laws.[12]

Although these three decisions conform to the spirit of the anti-combination laws, they have brought down a veritable storm of denunciation upon the courts. For six years the journals of organized labor have not ceased to pour out a stream of criticism and invective against our judicial organization, and to demand that judges be elected. The mildest expressions of this criticism are the constantly repeated statements: "The courts are hostile to labor," and Mr. Gompers' pious exclamation: "May God save labor from the courts!" We may only pause to comment that this criticism is due to a complete misunderstanding of the duties of the law-maker and the judge. It is the business of the judge to find out as nearly as he can the legislator's intention and then apply it.

[9] *Addyston Pipe Co.* v. *U. S.*, 175 U. S. 211 (1899).

[10] *U. S.* v. *Brims*, 272 U. S. 549 (1927).

[11] *Bedford Cut Stone Co.* v. *Journeymen Stonecutters*, 274 U. S. 37 (1927).

[12] *Duplex Printing Press Co.* v. *Deering, et al.*, 254 U. S. 443 (1921).

When Congress is forced, by the strong, insistent pressure of an organized minority group, to insert something in a law, it is apt to take its revenge by surrounding the unwelcome change with "provided howevers" and words of doubtful meaning.

This forces the judge to examine the proceedings of Congress, committee reports and other sources for information as to the real purpose of the law-maker. In short, Congress, lacking courage, makes apparent concessions to an organized group, withdraws its concessions by cautious provisos, weasel-words and a smoke-screen of generalities. This is precisely what it has done in the Clayton Act, and what has brought down a tirade of unjust criticism on the courts.

CLASSIFICATION OF CASES

From this hasty glance at a few outstanding cases, we notice that they fall into three general groups:

(a) Those in which the application of the Law is reasonably clear, as in the Addyston Pipe and Brims cases.

(b) Those in which the court could readily apply the Law, if the intention of Congress were made clear, as in the Bedford Stone and the Duplex cases.

It will be seen that in both (a) and (b) the nature of the problem is that of a legal controversy, over which the courts alone should have jurisdiction. The remedy for (b) is not a general abuse of the courts, but some intelligent action by Congress to make its policy unequivocally clear.

(c) Those cases which require for their solution extensive, impartial inquiry into business data, the formulation of an economic principle or theory, based on the careful weighing of great masses of purely business facts, and the decision as to whether a given policy will be beneficial or harmful to the public and to the business interests concerned. Such are most of the cases on mergers and prices. Is this the work of a court?

English and American courts have, in the past, attempted it with some success and have built up much of the common law on combinations in a long series of decisions on regrating, engrossing, forestalling, and so forth, running through several centuries. But are the conditions now such that our courts can in the future apply these principles to the growing needs of business and the consumer? This query leads to the third and final consideration which may influence our decision.

When a group of bankers is considering the union of a number of disorganized or separate elements in an industry, how shall they know whether the new consolidation will receive the stamp of Government approval or, perhaps, be ordered to dissolve after a court proceeding lasting six years? How shall an industrial manager, preparing a new campaign for the distribution of his products, be able to say definitely that his plans are proper and advisable, and that they will not subject him to prosecution for restraint? How shall a trade association, seeking to benefit its members by informing and advising them as to methods and policies, assure itself that its policies are within the letter and the spirit of the law?

During the highly successful administration of Colonel William J. Donovan, as Assistant Attorney General in charge of Anti-Trust Law cases, these needs were partly met by informal conferences between bankers, industrialists, trade association men and representatives of the Department of Justice. It is vital that this plan be not only reëstablished, but expanded and made available to all who seek to con-

form their business policies and practices to a law expressed in vague terms. We have already accepted this idea in many lines of business. Agreements between shipping lines on rates and charges may be submitted to the Shipping Board for approval. Consolidations of railways may be offered for approval to the Interstate Commerce Commission. Why cannot plans of consolidation and agreements on business policy be submitted to a Government authority?

These consolidations raise questions which in fairness to all concerned should not be threshed out through the long, costly and wasteful processes of litigation in the courts. The quickest of our important anti-trust cases reach a final decision in from five to six years. The Bucks Stove and Range case took nearly ten years, and the Danbury Hatters case required eleven years. Several of our most important decisions have arrived in time to be read at the business funeral of the plaintiff. It is vital that we correct illegal action before the injured party is unlawfully destroyed. It is equally vital that we prevent improper combinations and agreements at their inception by forward-looking decisions, regulations or advisory opinions, which will enable the business manager to know in advance whether a policy which promises great economic benefit to him and his customers will stand the test of legality. Our courts cannot do this.

If our brief survey of the kind of work and the amount of work to be done, and the time when it must be done, has been in any way convincing, our question has by this time answered itself, at least in part.

WHAT OF THE FUTURE?

Competition in its older form between many small, independent producers, is vanishing like mist before the sun, and its place is being taken by competition between whole industries and their products. The question which thus arises as to the rôle of the courts is a vital one. Are they in the future to scan the economic horizon, to weigh the value of each combination, to appraise its relative advantages and disadvantages, to confer with competitors, representatives of the consumer, of organized labor, of all the other parties respectively, and reach an economic conclusion from economic data?

The United States Steel Corporation was held to be a reasonable combination. Would a merger of General Motors and Chrysler be equally so considered? The oil industry apparently stands before the greatest consolidations of all time. The industry in its present form, although profitable for the larger companies, is extremely wasteful, in both its production and distribution, and unduly high in its price charges. When these monumental consolidations take place between oil companies now competitive, the Federal courts must make decisions which are, in substance, not legal, but economic. In doing so, they must map out a complete program of consolidation principles for both American and foreign enterprises. If the whole world of business is not to be plunged into continuing uncertainty, the courts must announce, in some epoch-making decision, a reasonable, broad, comprehensive code of principles which will be a guide for the future. This is exactly what they cannot do. They steadfastly and wisely refrain from laying down such rules and regulations, and confine themselves to their real duty of deciding controversies presently before them.

The courts, as now organized, should not administer our anti-trust laws as

at present framed. Their attempt to do so has compelled tribunals learned in the law to stray afar into conflicting theories of business organization, consolidation, consumer relations and methods of distribution.

This same administration by the courts, because they were courts, has been attended by unavoidable delays of the most serious nature, so that from six to twelve years may intervene between the asking of a vital business question and its final answer. It has not removed uncertainty as to the meaning of the basic trade law passed nearly forty years ago, nor has it been adaptable to new conditions. It has utterly failed to provide any comprehensive set of rules, principles and regulations for the future by which the managers of large enterprises can be guided as to the legality of their plans.

United States Attorney Charles H. Tuttle, of the Southern District of New York, in an address before the National Association of Credit Men, June, 1929, pointed out that the bankruptcy law had broken down in its fundamental principles, one of them being the court administration of bankrupt estates, *because of the nature of the work required of the courts* in this administration.

> The principal questions involved are business questions, for the decision of which the judges have little qualification. . . . The proper function of the courts is the decision of controversies, and whenever they step or are forced out of that function, they lose prestige, effectiveness and public confidence.

May we not, with equal force, declare that the administration of the trade combination laws requires more than the decision of controversies. It requires the working out of rules, regulations and settlements of distinctively economic problems, often in advance of a serious dispute or controversy.

SOME PROPOSALS

If not the courts, then, who shall administer these laws? To this there are two answers: either an administrative body created for this purpose, or a special court, with extraordinary powers concentrated upon the specialized enforcement of these statutes.

Those who favor an administrative body advocate the present Trade Commission as the proper authority to handle this problem. In doing so, they seem to forget that the Commission is already far behind its docket and that a single aspect of its present duty, viz., the suppression of unfair trade practices, is proving more than it can quickly handle. To add to this excessive burden the further duty of passing on consolidations, agreements and combinations, would be worse than useless.

The writer proposes that the Federal Trade Commission be divided into two sections, one handling the unfair trade practice cases, as at present, and the other, the mergers, consolidations and agreements above described.

The second proposal, that of an industrial court, which emanates from the most successful Anti-Trust Law administrator of recent years, Colonel Donovan, offers unusual possibilities.[13] It will doubtless meet opposition, because of the novelty of the proposal that a special Federal court, so created, should have the duty of giving advisory opinions in advance upon the legality of proposed business consolidations. There is little that can be urged against the merits of this proposal, but it might fail of adoption in Congress because of the many legal quibbles brought against it.

[13] See address of Colonel William J. Donovan, Pennsylvania Bar Association, June, 1929.

Recent decisions have clearly established that, while courts created under the judicial power of the United States may not give advisory opinions, courts created under other powers, such as the powers to tax, or the power over the territories, may give such opinions. A court created under the Commerce power could likewise do so.[14]

Colonel Donovan's proposal has also the distinctive merit that, like the former commerce court, specializing in railway cases, his proposed industrial court, specializing in commercial consolidations and agreements, could rapidly cover all important phases of the subject and keep business adequately informed as to permissible agreements.

If an administrative body were chosen, with the usual appeal from its decisions to the courts, it would possess a great advantage in that it could be given the power to fill out the details of the Law by regulations and rules. There is great need of these regulations to clarify the Law and keep it abreast of economic changes.

Our conclusion, then, is that those parts of our anti-trust laws which deal with mergers, consolidations and agreements involving restraint should be administered, not by the ordinary courts, but by some administrative commission or specialized court which would possess the following specifications: (1) speed; (2) the ability to examine, analyze and coördinate the distinctly business data concerned in merger problems affected by the Law, and to formulate, within the limits set by Congress, a series of sound economic policies governing such consolidations; (3) the authority to make rules and regulations looking forward to future combinations, as well as the decision of disputes on past mergers. This would include the important advisory duty which in the past, when undertaken under the right auspices, has proved successful in large part as a means of preventing litigation.

[14] See decision in *Ex parte Bakelite*, May 20, 1929, United States Supreme Court.

Enforcement of Anti-Trust Laws by the Courts or a Commission: A Comparison[1]

By GILBERT H. MONTAGUE
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TWENTY-ONE years ago, referring to the Sherman Act, a New York judge, in the American Tobacco case then on its way to the Supreme Court, said in effect:

> This statute is revolutionary. It practically prevents any combination. It prevents the joining together of any two express men, no matter how small they may be, if they are driving rival express wagons between villages situated in contiguous states.

That is what Judge Lacombe, in 1908, said of the Sherman Act. If that had been true it would have meant the absolute disintegration of business. What I shall describe briefly below is the way in which the Supreme Court of the United States accepted that challenge and what the Supreme Court has since done about it.

In 1927, in examining the International Harvester Company, which comprised over sixty percent of the industry, the Supreme Court said: "Since competitive conditions have not been disturbed, and outside that company there is healthy competition, there is no violation of that Law." Throughout the twenty-one years which intervened between these two decisions, and more particularly in the eighteen years since the Supreme Court decisions in the Standard Oil and the American Tobacco cases in 1911 and until the present time, the Supreme Court has interpreted and applied the Sherman Act in a succession of notable judicial decisions which forever will be one of the glories of jurisprudence, in this and every other country where the common law rule of law through judicial decision prevails.

PRESENT STATUS OF THE SHERMAN ACT

The courts long since have left behind the belief that the Sherman Act had any such meaning as Judge Lacombe gave it. The Supreme Court's interpretation and application of that Law to American business during the past eighteen years has scored the double triumph of opening up boundless opportunities for wholesome development throughout the entire field of American business, and at the same time of so strengthening the safeguards required in the public interest that the Supreme Court of the United States has now practically eliminated from American politics what we used to call the trust problem.

Eighteen years of construction and application by the Supreme Court have brought the Sherman Law to approximately the following position. Previously competing units may now merge, consolidate or combine, by agreement or otherwise, whenever warranted by sound economic considerations, provided always that there remain outside the merger, consolidation or combination enough rival competing units of sufficient strength and activity to insure the continuance of actual competitive conditions at substantially every point throughout that industry.

[1] In this paper Mr. Montague has utilized portions of his address before the New Hampshire State Bar Association, July 2, 1927, entitled "The Regulation of Business," and his address before the Michigan State Bar Association, September 13, 1929, entitled "Courts, Commissions and the Anti-Trust Laws."

Big business—and little business, too—in the past eighteen years has proved that large size and high efficiency need not be feared so long as outside competition continues vigorous and healthy. With the ever-evolving progress of American economic life, the above rule seems certain to be applied more and more broadly by the Supreme Court, the other Federal courts and by all the officials charged with the administration of the Sherman Law.

Except by fair competition, by fair and reasonable persuasion or by peaceful severance of business relations between the disputing parties, no person, firm or corporation, whether a merger, consolidation, combination, labor union or a single unit, may in any way, under any pretext of self-advancement, obstruct, impede or retard anyone else from carrying on his lawful business of livelihood.

Business in the past, especially since 1914, has imposed upon itself and demanded of its competitors higher and higher standards as regards competitive methods. As American economic life becomes more and more highly developed, this rule seems certain to be more and more strictly applied and enforced by the Federal authorities.

The two kinds of restraint with which the Sherman Act deals are, first, the restraint which may arise when people refrain from competing with one another, and second, the restraint which may arise when people do compete with one another.

As to how many units previously competing can either merge, combine or consolidate, the Sherman Act, as it is now interpreted and applied by the Supreme Court, permits any combination, any merger and any consolidation which is justified by economic considerations so long as outside such combination, merger and consolidation there remains enough healthy competition to insure a continuance throughout the whole of that industry of healthy, competitive conditions.

That is one kind of restraint with which the Sherman Act deals, and now we take up the other. What can a person, firm or corporation that is carrying on a business, be it a unit, a combination, a merger or a consolidation, do as regards its competitors, and what can a labor union do as regards people that are outside the union? The law on that has been pretty well worked out. Except by fair competition, except by fair persuasion or except by a peaceable cessation of negotiations between the disputing parties, no labor union and no person, firm or corporation, be it a single unit, a combination, merger or consolidation, has the right to interfere with anyone else in the pursuit of a lawful living.

Such is the sum and substance of the law in respect to this second kind of restraint. In respect to that phase of the law, business has been imposing upon itself such higher and higher standards of competition that I prophesy we shall find that the Supreme Court and the other Federal courts, as well as the officials of the Government charged with the administration of the Sherman Act, will be more and more strict as to what shall constitute lawful competition, as to what shall constitute fair persuasion and as to what shall constitute peaceful cessation of relations, because increased economic knowledge, increased economic pressure and the ever-growing conscience of the American people will demand that a stricter and stricter standard be observed in respect to what one can do with the man with whom he is competing.

These statements express in colloquial and business man's language the substance of the Sherman Act as the law now stands.

SHERMAN LAW NOT OUTMODED

We have in prospect two lines of development: first, that bigger and bigger combinations, mergers and consolidations and greater and greater efficiency in business organizations will be permitted, so long as enough outside competition remains to insure continued competitive conditions; and second, that the standard of ethics which one must observe in competing with his rival manufacturer, his rival distributor or his rival workman will be rising higher and higher.

These two lines of development, to anyone looking at the law in 1908, were inconceivable, and the succession of decisions of the Supreme Court of the United States which brought them about is perhaps the most striking illustration in legal history of the ability of the judiciary to make the law conform to changing conditions in economic life.

Nothing can be more erroneous than the idea, which is being propagated in certain quarters, that because the Sherman Act was passed in 1890, before the period of the radio and the automobile, it, therefore, is a law that now needs to be changed. The assumption underlying this idea is that the Sherman Act is like a speed law which fixes, let us say, fifteen miles an hour as the speed with which you can travel with your car over a public road. The Sherman Law is not of that type. It is like the law which imposes a duty in respect to negligence. Fifteen miles meant identically the same distance in 1800, in 1900 and in 1929. Negligence meant one thing in 1800, it meant another thing in 1900 and it means still another thing in 1930. It is a growing conception. Fraud meant one thing three centuries ago, another thing two centuries ago, another thing a century ago, another today and will mean still another thing ten years hence.

The Sherman Act, as it has been interpreted and applied to American business by the Supreme Court for the past eighteen years, is not, and never will be, outmoded. One might as well say that the Golden Rule, enunciated in Palestine nineteen hundred years ago, before radio was invented and before automobiles were invented, must therefore be discarded. When those words were first uttered in Palestine they meant one thing. Ten centuries later they meant still more. Ten centuries hence they will mean still more.

With the growth of the years and the progress of American economic and social life, the interpretation and the application of the Sherman Act to American business will grow and progress under the successive decisions of the Supreme Court of the United States, so that at all times it will be well abreast of the needs of American civilization.

What is the process, and what are the qualities, which have enabled the Supreme Court to do these things?

STABILITY AND FLEXIBILITY OF LAW

Law must be stable, but law cannot stand still. New conflicts in economic life, new pressures of economic interests and new dangers to economic security call for continual readjustments of the law to the changes in our economic life which it governs. Law must be flexible as well as stable. Courts, therefore, in their exercise of the judicial process, must sometimes make tentative, cautiously restricted sallies into debatable areas of economics and sociology, venturing only so far as is necessary to dispose of the particular case in hand, saving always

some way of retreat by limiting such decision to the exact facts of that particular case, mindful always that compromise is necessary between the need for stability which economic and social security requires and the need for flexibility which economic and social growth demands.

This is the method that centuries of prestige, tradition, training and method have built into the courts and into the judicial process. By this method the Supreme Court, during the past eighteen years, has won general acceptance for its Sherman Law decisions, and has incidentally, unobtrusively, but none the less decisively, done more than all our economists, sociologists, publicists and politicians to solve what used to be called our trust problem. The Sherman Act decisions of the Supreme Court during the past eighteen years are a classic illustration of what courts can accomplish, by virtue of their centuries of prestige, their centuries of tradition and their centuries of training, in their search for this equilibrium between stability and progress in the interpretation and the application of a law of this growing meaning, such as is represented by the Sherman Act.

We ought not to permit exceptional cases like the petroleum situation to obscure the magnitude of the accomplishment of the Supreme Court of the United States in what it has done, in its succession of Sherman Act decisions during the past eighteen years, to make of the Sherman Act a veritable bill of liberty to American business and to American labor to expand, to grow, to combine and to attain the highest point of efficiency possible, provided always there is a continuance of healthy competitive conditions and that no unfair competition is practiced against outsiders, competitors or the public.

No Need for Proposed Commission

Now that the Supreme Court has so interpreted and applied the Sherman Act to American business as to make the law the epitome of American standards of business ethics, competition and ideals, where in all this picture is there any room for the suggestion being made in certain quarters that we should take those matters away from the courts, or, at any rate, interject between the courts and American business men some commission which should pass on those questions?

This suggestion starts with the complaint that there are some instances of doubt under the Sherman Act—as indeed there are in every growing subject in the law, as for example, in negligence or fraud—and then leaps to the conclusion that, because of the existence of these instances of doubt, there should be set up outside the courts some commission to which business men might repair, with the assurance that they can lay their plans before that commission and get a definite answer as to whether their plans are, or are not, in conformity with the Sherman Act.

If there are to be commissions to pass in advance on Sherman Act questions, why not have commissions to pass in advance on negligence questions and fraud questions?

The Sherman Act has been brought to its present situation and its present development of meaning and construction solely because the Supreme Court of the United States utilized that judicial process which has been built into all courts by centuries of tradition, prestige and training. To hand over the further development of the Sherman Act to a commission created by legislative fiat, with no tradition, no prestige and no special training, would be to uproot what has

been the heritage of years of experience. We tried that experiment in 1914, when we set up the Federal Trade Commission, with what was then hailed to be an emancipation from legal precedents and the judicial process. Because the Commission disregarded legal precedents, judicial process and tradition, the result was chaos, until the Supreme Court finally required the Commission to take its law from the courts, and thus brought the Commission back to limits that are very close to the confines of the Sherman Act.

Let it always be remembered that our magnificent economic development of the past three or four years has been coincident with, and in very substantial degree assisted by, the Supreme Court's interpretation and application of the Sherman Act.

Never before, in this generation, has there been more sympathy and concurrence between the genuine desires of business and the willingness of courts and the Government to coöperate with business. Unquestionably this sympathy, this concurrence, this willingness and this coöperation have contributed very materially to the rise of the United States to its present premier economic position in the world. To the Supreme Court belongs the credit for this contribution.

The suggestion that there should now be interjected between American business and the courts a commission, which would somehow pass in advance on these Sherman Act questions, falls between the horns of a dilemma.

If the commission is simply going to pass on questions identical with those which the Supreme Court has decided again and again, then the commission will be nothing more than a legal dispensary, giving free advice to a group of business men who do not need charity.

If the commission is to go further and is to venture into debatable ground in order to decide close questions of economics and sociology in the twilight zone of the law, then the conclusive answer is that the Supreme Court, in its succession of Sherman Act decisions during the past eighteen years, has proved that the courts are the best qualified institutions in the country to do this work. This line of decisions demonstrates that if there are any debatable questions of economics and sociology to be decided, the courts, and the courts alone, should be allowed to continue the work which for eighteen years has been done in a most masterly fashion by the Supreme Court of the United States.

No commission entrusted with arbitrary power to validate or invalidate agreements, business practices, combinations, consolidations or mergers will ever, I believe, be permitted by public opinion, by Congress or by the Supreme Court to apply or enforce more "liberal" rules than the two rules in which I have attempted to summarize the scope of the Sherman Law. Certainly the Federal Trade Commission's earlier history tends to show that in its rulings upon business practices, agreements, combinations, consolidations and mergers, no commission will ever dare to be more "liberal" than the courts have been in their construction of the Sherman Law since 1911.

Increased powers of paternalistic interference, at the hands of a commission applying a rule no more "liberal" than the Sherman Law as it is now construed by the Supreme Court, are all that is promised in the present propaganda for the old 1914 idea that the regulation of business should be taken out of the hands of the courts and vested in some commission.

The trust problem was for over a

generation one of the staples of American politics. Today it is so near to solution that it has ceased to be a political issue and has almost disappeared from the news. To the Supreme Court, more than to anyone else, belongs the credit for eliminating the trust problem from politics.

Organized Labor Demands Repeal of the Sherman Act

By MATTHEW WOLL

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REPEAL or modification of the anti-combination and anti-conspiracy provisions of existing laws, specifically of the Sherman and the Clayton Acts, is regarded by American organized labor as a national necessity in the interest of progress, freedom, justice and democracy. Under each of these four heads the repeal or modification of these archaic and oppressive laws is warranted and essential.

"THERE OUGHT TO BE A LAW"

We go back to a time far different from the present to find the inspiration that brought into being what we popularly call anti-trust laws. It was a time of fear. A great new power was growing up in the nation. A new force was coming into being. A money Goliath was rising up and stalking through the land. Little business men, manufacturers and distributors were being slain with ruthless might. They sought a pebble to fit their sling, having no mind for more modern weapons. They sought law to save them from a basic economic change. The cry of the ages, "there ought to be a law," sprang to their lips; and lo, there came a law.

The law remains, a strange anomaly of medievalism in a day of scientific miracles, as out of harmony as is the ox-cart beside the fleet and shining product of our finest motor manufacturer, as dangerous as the old oaken bucket in comparison to the modern water supply plant.

With the coming of the trust the corporation came into its own. The corporation is a creation of the state. Upon that created entity certain powers are conferred. Harnessing power to shafts brought the motive force for running the mechanical division of modern industry. Harnessing money power through the corporation brought the might to operate the financial division. The trust was the signal that mass production, mass distribution and mass consumption was upon us. The great and fearsome tank had come to roll over the infantry and the infantry, in fright, fought back with the weapons nearest at hand, lacking time to bring imagination into play or to center intelligence upon the problem through the slow process of analysis. Blunders were made. Anti-trust laws were enacted. It was made a conspiracy to restrain interstate trade.

Manifestly, the Federal Government could not act against the restraint of trade within a single state, but it could and did step in to prevent conspirators from operating across state boundaries. State boundaries have been the inspiration of a great many legislative monstrosities, as well as some good things. But this time we got a monstrosity.

If the object sought seemed good, the ends achieved have been distinctly negative.

Who is there that has the hardihood to contend that conspiracies in restraint of trade have ceased? Clearly, the Sherman Law was intended as an instrument for the slaughter of trusts, the assumption at the time having been that the trusts were evil things, come to prey upon a helpless people—helpless except for the Sherman Law.

It would be easily possible to build up a legalistic argument loading the record with citations, quotations, precedents and references, going into the fundamental structure of our system of law, its forbears, its operations and its theory. But of what avail would that be?

We are confronted with a problem which calls for reason and for the translation of reason into law. Moreover, the reason must proceed from the facts of 1929–1930 and not from the facts of 1880–1890.

LAW FAILS TO CHECK TRUSTS

Looking at the facts of this current year, we find that the anti-combination and anti-conspiracy laws have not by one sensible iota retarded the growth of manufacturing and business combinations, nor have they even sought to touch the great banking corporations which are the fathers and the nurses of so many combinations. Some sardonic wraith from behind the shelter of invisibility must be enjoying the most monumental joke of the age as our plight is contemplated. Intended to bring relief to the common people, the anti-combination and anti-conspiracy laws have brought only further oppression to the common people because no trusts have been smashed, while labor unions, the refuge, the strength and the hope of the common people, have been dealt blow after blow by the very laws through which protection was sought.

No, we have gone at the matter wrongly. In the anti-trust laws the people sought, vainly and shortsightedly, to halt an economic development that could not be halted. Essential economy was at the bottom of the whole business of combination. The trend, natural as the waves are to the sea, would not be halted. It might be swerved, it might be compelled to hire expensive lawyers to find loopholes, it might be bothered, annoyed, nettled, but not stopped.

LABOR AND THE LAW

Combinations of wealth, power and machinery have gone on. But combinations of workmen, formed to protect humanity against organized employers, came under the ban of the Law. Injunction after injunction has rested itself upon the anti-conspiracy clauses of the Sherman Law. Workmen, joining together to secure for themselves an equable bargaining power, came into sharp collision with the laws which in 1890 the populace looked upon as its cure-all, its guardian and its deliverer. We brought upon ourselves a legislative travesty at which our heirs will laugh tremendously.

Back in the "good old days" of illusions, innocence and faith, it was not believed that a labor union would assume the form and guise of "a conspiracy in restraint of trade," but that is what came to pass. Workmen, asking decent wages, decent living conditions, fighting the battle that by its percentage of victory has helped make America prosperous, were denounced before the courts as conspirators, because their demands, when rejected by employers, could be cited as efforts to interfere with the manufacture or movement of products which entered into commerce across state boundaries.

All this sounds highly fantastic and highly improbable. If it were a forecast it would be denounced as fiction, impossible of realization. But it is not forecast; it is history. The law books teem with case after case, until the total mounts high into the hundreds, and perhaps well into the thousands, of cases of commands to workmen not to conspire to hinder interstate commerce.

The anti-trust laws have brought us a revival of burning days, a recrudescence of bigoted New Englandism at its very crudest and narrowest.

The American Federation of Labor long since saw the necessity of repealing the anti-trust and anti-conspiracy laws. It declared for their repeal as long ago as 1925, and this year it has repeated the demand with much emphasis. Labor has a double reason for asking this repeal. First of all, labor has no desire to interfere with logical and proper economic currents. Labor is for economy. It abhors waste, either of materials or humanity. Labor believes in economy of effort. There is no question about that. Abuses may and do attach to all kinds of trusts. The horizontal trust and the vertical trust are alike infested with evils, unless proper steps are taken to check the evils. But we do not, in our present state of civilization, kill sick men. We try to cure them, going to great effort in that direction. Why should we seek to kill an institution that is basically sound, even if for the moment it is beset with a baffling ill? The answer is, obviously, that we should preserve the sound institution, seeking a cure for the ills and seeking until we succeed in finding what we seek.

I do not intend to burden the record with a recital of the infamous manner in which the Law has been brought down upon the heads of workmen. I do not intend to relate how it has been made illegal even to exercise the constitutional rights of free press, free speech and free assemblage where interstate commerce is concerned. But the courts, under laws which were enacted specifically and solely to kill trusts, have destroyed every right of free men and women. There is case upon case, until one grows weary with the recital, of orders commanding working men and women not to speak of certain facts, not to write letters about them, not to print anything about them in newspapers and magazines, not to go near certain public places, not to walk upon certain public streets, not to congregate or to petition, not to do anything except to forget about everything having to do with their place of employment and the terms and conditions under which they would give service.

Julius Caesar was proficient in governing by might, but he could have learned much from the courts of today, which have at their command the anti-conspiracy provisions of the Sherman and other laws.

LABOR DEMANDS REPEAL

No trust in all our industrial history was ever more heartless, more ruthless, more disregardful of every phase of human welfare than the United States Steel Corporation. It brought the raw material of untutored, expectant humanity from the slums and the welter of overcrowded Europe and it sent these masses of human hulks against the flaming heat of its hot furnaces and molten metal, burning them out, tossing aside the wreckage like so much discarded slag. Yet the steel trust lives, the Sherman Law to the contrary notwithstanding—very much notwithstanding.

Who does not remember, if he lived during the period, how the great octopus of oil was pilloried, denounced, caricatured, investigated, exposed, hounded and decried? Yet it lives, stronger in every fiber, the Sherman Law to the contrary notwithstanding. Who does not remember the tirades of those older days when an eager but foolish people looked to the Law for destruction of these new giants of wealth and industry? When the courts could no longer find another way out by which great corporate wealth might remain intact there was a resort to

"the rule of reason," which was proper and which was a credit to the judges who were bright enough and daring enough to put the whole business at last on that sensible plane.

While the great trusts have lived, prospered and grown fat, there is not a national or international union engaged in occupations having to do with the trusts that does not bear the scars of battle after battle to survive the same laws. Laws through which the trusts come unscathed and strengthened have taken their toll of injury and death from labor. The unions have been scourged from pillar to post. Our workmen have become conspirators in a land of men who boast before the world their freedom. The Great Guaranties have been replaced with a court-made catalogue of "shalt nots" that go beyond the dreams of kings and transcend the power of emperors.

So we who care about freedom, who care for progress, who want to preserve the guaranties, who want to have a voice in determining wages and working conditions, we come saying these vicious laws must be repealed. They do not stop trusts; they hit only workers. They were enacted to stop trusts, not to injure workers. Why should they not be repealed? Who today lifts an unselfish voice in defense of these provisions of our law? Let him stand forth to be examined!

Needed Changes in the Anti-Trust Laws

By RUSH C. BUTLER

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THE few "combinations" and "trusts" against which the legislative vigor of Congress was directed by the enactment of the Sherman Law in 1890 were insignificant in size and power in comparison with many ordinary present-day corporations, some of which have experienced judicial approval and others of which are well assured of their complete conformity to the Law. The question naturally arises as to how this has come about and what may be the general effect of the anti-trust laws on business in the years to come. In order properly to discuss this phase of the subject a brief reference to the history of the Sherman Law is necessary.

The Sherman Law goes beyond the rule of conduct embodied in the common law, in that the former in unmistakable language makes unlawful every contract in restraint of trade, no matter how heavy or how light the restraint or whether reasonable or unreasonable. It further differs from the common law in failing to provide that the courts will not afford a remedy to a party to a contract violating the common law rule and by including a paragraph making every violation of the Act a criminal offense and subjecting the offender to a penalty of fine and imprisonment. The criminal provision of the Act is a complete departure from the common law and is not only the cause of much of the difficulty experienced by the courts in interpreting the Act as a criminal statute, but is an economic menace.

It is thus apparent that the *legislative* and *not* the *judicial* branch of government is responsible for the difficulties arising under the Sherman Law.

JUDICIAL DECISIONS

The application of the Sherman Law to *every* contract restraining trade was limited by judicial decisions rendered in 1911 in the Standard Oil and Tobacco cases so that it may be broadly, if not accurately stated, that now only such contracts as unreasonably restrain trade are unlawful. In those cases the so-called "rule of reason" was held to supplement the statute and to afford the true guide in establishing the legality or illegality of contracts in restraint of trade. Under the Court's interpretation the merger, consolidation or combination of formerly competing units was held lawful if the resultant restraint were reasonable and not unreasonable. The decisions in these cases were necessary. They were made in recognition of the operation of economic law. No more forceful illustration of the domination of economic over statutory law can anywhere be found. Without such interpretation the statute must certainly have been repealed or business and industry must have failed to grow and expand commensurately with the development of the country. Since that interpretation of the law it is quite generally understood that in the absence of conspiracy to monopolize, agreements of consolidation and merger are proper, provided only that the resultant unit be not so large as unduly to dominate the competitive field.

The present prosperity of the country is largely due to the fact that the courts have freed mergers and consolidations from the limitations im-

posed by the Sherman Law. The business of consolidating prospers today as never before. Industrial organizations of a size hitherto unknown have come into being, many of which are mergers or combinations of former competitors. The results seem to be satisfactory to most people.

There are reasons other than economic upon which immunity of mergers or consolidations from the provisions of the Sherman Law is based. Large industrial units no longer threaten the peace of mind of the average citizen. He is now the holder of their stock and as such is their owner and entitled to an interest in their profits. Proprietary interest in corporations has passed from the hands of the few into the hands of the many so that all classes of people are included in the stockholders' lists of practically all of our large corporations.

Labor, too, is happy in its relationship with organizations capable of mass production. American labor enjoys the highest pay ever experienced in the history of the world. It works a short day and under favorable conditions. It is assured not only a living wage, but one affording a modicum or more of luxury and a competence for the education of children and for old age. Its continued competition with low cost labor of other countries is guaranteed by mass production at a low cost per unit produced, which in many industries would not be possible without consolidation of small operations.

So far as the "consolidation" is concerned, its future is well assured under the Sherman Law.

CONSOLIDATED AND NON-CONSOLIDATED UNITS

A fair consideration of the application of the Sherman Law to the activities of non-consolidated concerns through their trade associations or otherwise reveals an unenviable situation in the administration of justice and in the world of business and industry. On the one hand, prices fixed by agreement among a consolidated unit on all of the products of former competitors, even though those products continue to be competitive as between themselves as well as with the products of other manufacturers, are lawful; whereas, on the other hand, prices fixed by non-consolidated competitors, even though the agreed prices are reasonable, are unlawful. Furthermore, the consolidated unit necessarily controls the competitive condition of its component parts formerly competing, both as to the limitation of territory in which they shall sell and as to the volume of output of each, while the non-combined organizations agree as to these matters at their peril. There is no agency of government anywhere to which appeal may be made for the purpose of determining the extent to which non-combined units may divide territory or limit production even though it may be their legal right so to do.

"Big business" suffers from this limitation as does little business. The oil industry, which it may be assumed is "big business," is an outstanding illustration.

THE FEDERAL OIL CONSERVATION BOARD

It has been a matter of common knowledge for years that due to conditions beyond the control of any individual or any limited number of oil producers, there has been overproduction resulting in economic waste, poor business and the indefensible destruction of a valuable natural resource, the supply of which is limited. So serious had been conditions in the industry

for a number of years previously that on December 19, 1924, President Coolidge, by executive action, that is, by his own authority and without an act of Congress, created the Federal Oil Conservation Board and authorized it

> to study the Government's responsibilities and to enlist the full coöperation of the representatives of the oil industry in the investigation.

In his letter creating the Board the President said:

> The oil industry itself might be permitted to determine its own future. Government and business can well join forces to work out this problem of practical conservation.

Congress gave approval to the President's action by appropriating certain funds to meet the expenses of the Board. The public also manifested approval of the President's action. After the lapse of more than four years, during which time doubt and uncertainty as to the rights of the industry and the legal status of the Board caused any action to be deferred, the American Petroleum Institute submitted to the Board a proposed agreement permitting the members of the industry to limit production in certain areas for the year 1929 to the amount produced in 1928, provided that such action be first approved by the Board and by the authorities of the states affected. The Chairman of the Board, the Secretary of the Interior, asked the Attorney General for his opinion as to whether the proposal of the Institute was in violation of the anti-trust laws. In his reply the Attorney General, among other things, said

> that no action taken by the Board would have the effect of relieving parties to such an agreement from the operation of the anti-trust laws of the United States and of the states. . . . As the powers of the Board are limited . . . the question whether the proposed agreement would violate the anti-trust laws of the United States is apparently not a question arising in one of the Executive Departments on which the Attorney General is authorized by law to give an opinion.

The Attorney General's letter terminated more than four years of coöperation between industry and a governmental agency properly conceived and constituted, but lacking authority to act. The letter of the Attorney General, legally unassailable, was written no doubt with regret, for the attitude of the Administration was universally known to be favorable to the sound economic policy involved in the situation. It cannot be too strongly emphasized that the oil industry possesses the right under the Law as it stands today to enter into agreements limiting production, but no one knows the extent to which the right may be so exercised. The right to limit output has been sustained in a comparatively recent case decided by the Supreme Court of the United States. And yet, in spite of its existence, the producers of oil are unable to exercise that right because of the menace of the Sherman Law. What has been said about oil applies equally to coal, lumber, textiles, to a considerable extent, and many other industries and lines of business concerning which no special act has been passed.

Business must continue to grope its way through legal darkness until legislative relief is afforded. Legislation alone can remedy existing difficulties. Extensive legislation is not necessary.

PROPOSED AMENDATORY LEGISLATION

The suggested amendatory legislation, in brief, is this: that the administrative agencies upon which Congress has already conferred regulatory power in given instances be authorized to

approve agreements voluntarily submitted by the parties thereto, and that such agreements and acts done in pursuance thereof pending the existence of such approval be not subject to the criminal provisions of the Sherman Law. This is not a proposal to repeal or amend the Sherman Law. It does not mean that the agencies so authorized would be expected to or could give judicial approval to such agreements or acts done thereunder. On the contrary, it is to be assumed that no such approval would be given to any agreement which the courts might subsequently hold to be in violation of the Sherman Law. It would mean, however, that agreements could and would be made within the limits of the lawful rights of the parties, agreements which now they dare not enter into for fear of invoking criminal penalties. This proposal confers no power upon administrative agencies to determine whether or not agreements so voluntarily submitted violate the Sherman Law. It confers no power whatsoever on the agencies to act in a judicial capacity or to make exceptions in the application of the Sherman Law. Agreements violating the Sherman Law would not be made legal by the approval of the administrative agencies, but if approval were given in error in any case the criminal provisions of the Law would not be applicable until after a specific order had been entered and definitely violated. The suggested amendment will eliminate the threat of punishment which deters men from entering into lawful contracts because of uncertainty attending the application of the abstract rule of law to the complex economic facts of their particular industry or segment of an industry. It will encourage the development of better business methods and the rendition of a higher degree of business service.

As a result of this legislation the Federal Trade Commission and other agencies would be in a position to lay out their programs of procedure. Legal status will be given to the Commission's Trade Practice Conferences, now without statutory sanction. It is conceivable that the Federal Trade Commission might re-adopt its present trade practice plan and broaden and strengthen it, making enforceable the unenforceable rules now adopted in pursuance thereof.

The proposed legislation would give great impetus to the movement for self-regulation of industry and would enormously broaden the field in which competitors would lawfully coöperate with each other in the development and enforcement of higher and more efficient standards of business practice in their respective industries.

The realization of the happy status of mergers and combinations under the Sherman Law justifies the expectation that lessons have been learned which will be reflected in future anti-trust legislation relating to uncombined competitors and their common activities either through trade associations or otherwise. It is generally believed: (1) that in enacting the Sherman Law the legislators of 1890 were largely mistaken in the economics of the subject with which they dealt, and that only by judicial interpretation has the resultant evil been partially cured; (2) that no statute should provide punishment for an undefined crime; (3) that the criminal law should not be employed as an aid in the enforcement of an administrative statute until an administrative order has been definitely formulated and definitely disobeyed; (4) that government should safeguard to business its right to self-regulation not inconsistent with the public interest; and (5) that legislation affecting business should be so conditioned as to permit full force and effect to be given at all times to current economic conditions.

That Congress understands the problem and looks with sympathy upon efforts to make its solution less difficult is evidenced by several Acts passed beginning in 1913, which are set forth in *The Annals*, March, 1919. It seems fair to assume that Congress may be expected to look with favor upon any reasonable proposal to remove the restrictions which make it unsafe for a business man acting in good faith to enter into agreements concededly within his lawful rights.

ELIMINATE GOVERNMENT FROM BUSINESS?

There are some who will say that the proposed legislation means more government in business. The contrary is true. Government is in business today to an extent that cannot be measured. Note the case of the oil industry above referred to. Is there any more baneful influence than that which the Government through the Sherman Law exercises upon the producers of oil? Government is now in their business. It is there in the person of its least scientific, least forward-looking, most arbitrary representative—the criminal prosecutor. No instrument of social adjustment is less in accord with the spirit of the age and the needs of the situation than this 1890 charter for 1929 business. In the case of the oil industry the fear of the Sherman Law has not only threatened to, but actually does, keep the industry in economic chaos. It keeps oil producers from exercising their rights under the law. It is for Congress to take government out of business and permit business to lay down its own rules and make its own agreements within its lawful rights. So long as business acts in good faith openly and with governmental approval, it should be granted immunity from criminal proceedings. In this way industry will be permitted to regulate itself, make its own rules and establish its own prices, with full knowledge on the part of the Government of exactly what is being done and with the right in government to withdraw its approval at any time it appears that the conduct of industry becomes unlawful. This is a simple remedy. It is subject to no constitutional or administrative objection. It is scientific rather than legalistic. It is easily workable and will give industry the opportunity to run its own business to the full extent of its legal rights.

This proposal does not authorize the fixing of prices by agreement. It does not apply to one industry alone, but to all industries in all lines of business. It does not attempt to deprive the courts of the power to determine whether or not the party to an agreement violates the Law. It does not attempt to confer judicial power upon any legislative or administrative agency. It is not complicated by any encroachment of the labor problem which seems to some to present itself when amendment to the Sherman Law is proposed.

The activities of the trade associations of the country would feel the stimulus of the suggested legislation.

TRADE ASSOCIATIONS

There are in the United States today some thirteen thousand trade associations. Of these four thousand are national in scope and nine thousand are state-wide or local in their activities. These associations are organs created by independent business in the United States, principally during the past two decades, for the purpose of securing for business the benefits of

coöperation without sacrifice of individual initiative and independence. It is to the credit of the larger business organizations of America that for the most part they have coöperated with these trade associations and have not only given freely of time and resources to the group institutions serving the smallest units in their respective industries, but have also in numerous instances supplied able leadership to the trade association movement. Nevertheless, American trade associations are primarily the creation of the independent, medium sized and smaller business units.

As the agricultural coöperative movement has been the spontaneous outgrowth of the need of the independent and individualistic American farmer for the advantages of concerted action in his field of marketing and distribution, so in the field of business the trade association is the instrument which has been constructed to serve the same ends. This difference, however, exists between them, that whereas the cooperative movement in agriculture has been given legislative recognition, the trade association exists apart from statutory authority and carries on its activities in the light of uncertain and wavering judicial pronouncements.

The trade association movement has been helpful to business and should be encouraged by the law. Trade association activities in many instances have been given aid by executive and other administrative officers of the Federal Government. It seems clear that by the proposed statutory enactment a procedure as scientific in spirit and purpose as that which has characterized industry's approach to its problems of production could be set up, whereby the line may be drawn and clarified between what is proper and what is improper as among competitors, from the viewpoint of the public interest.

Such procedure should be worked out free from the overshadowing threat of a statute enacted in the middle ages of American economic growth. New legislation is required. With its enactment, trade associations, reconciling the ideals of coöperation with the initiative of American individualism, and trade practice conferences, expressive of the newer ideal of coöperation between government and business, will both enter into a new era of responsibility and usefulness. Their doors open in the future as in the past to all alike, trade associations without uncertainty and without apology may be counted upon to take full advantage of the opportunity which will have been placed in their hands to act as scientific laboratories for as yet undeveloped activities in the field of business organization.

What the Anti-Trust Laws Should Be

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THE unintelligent are those who speak hasty and absolute judgments—such is the substance of one of Mr. Bertrand Russell's remarks. Those who ponder the scope and wisdom of our anti-trust laws may well take this commentary to heart, for, in the majority of cases, the ordinary observer has not even inventoried the important factors which should be given consideration before reaching a conclusion in respect to such laws.

THE REGULATION DILEMMA

Collective action or organization in commerce and social life is one of the useful developments of modern times which has expanded so rapidly that we are not yet attuned to its capacity for good or ill. In degree, if not in kind, it presents new problems without adequate understanding or experience to meet them. We do know, however, that the power and capacity of combinations, whether of business men or workers, are greater than the sum total of the power and capacity of the members of the combination, and that some checks or regulations seem necessary to assure a fair measure of economic justice and commercial liberty. In a society which seeks justice and liberty, the unorganized are not wantonly to be preyed upon by the organized. In modern commercial development—the intricacies of which make for interdependence between all units of our social structure—no indispensable or valuable service can be permitted, by any form of coercive combination, to "hold up" the remainder of society. Since human power does not always stop at the portals of justice some restraints are necessary.

The underlying social question, therefore, is the maintenance of reasonable safeguards for the protection of the rights of the individual in business and the rights of society as consumers. To this problem, there are two basic approaches. The first is thoroughly to supervise and regulate all industrial activities, so that no combination can charge oppressive prices, impose oppressive wages or otherwise unfairly conduct itself. That means a large degree of governmental management. There are many who would venture gaily down the trail of this experiment with confidence that law and government would keep the trail clear of such outstanding inequalities and maladjustments as now figure in our daily experience. Others shrink from such a course. Generally speaking, as objections to any such policy, all industrial organizations, whether of employers or employees, point to the ineptitude of government as a manager of business, the dangers of overloading the ship of state with too many duties, the crimping of individual initiative and the curtailment of liberty. America's spirit of self-reliance and its prevailing political philosophy are not friendly to such a program.

The second approach, which is the one followed in this country, is to protect freedom of competition and individual enterprise from voluntary or involuntary restraints, and rely upon the economic forces of supply and demand to regulate the conduct of business combinations. Such is the purpose of our anti-trust laws. If the Govern-

ment insists that the actual or potential competitor must not be obstructed, and that the big fellow must not interfere with the little fellow or with the unorganized, it becomes obvious that big business, or the powerful combination of any character, must exercise restraint in order to avoid a course of conduct which through excessive prices and profits would stimulate the growth of rivals. The law of supply and demand thus controls without governmental price regulation. The public protects liberty, and liberty protects the public. All business units thus make their bid for public favor, and survive only through the commercial suffrage of the consumer. If any group having a dominating control unites by merger or price-fixing agreements, or the like, to control any line of activity to the public danger, the law merely says that those combining must leave sufficient competing units outside to protect society from oppressive arrangements.

Here, then, are the two theories which one must contemplate, and it is difficult to discuss the problem without being impaled, to some degree at least, on one or the other horns of this dilemma. Either we must tend toward the policy of bureaucratic supervision, where, as in the case of railroads and public utilities, the Government will regulate industry with far more detail than at present, or we must stand by our present program of prohibiting monopolies and of protecting liberty, so that competition will remain our business regulator and social protector. At the threshold of any discussion of our anti-trust laws, one must weigh these two opposing theories with their underlying philosophies.

FAITH UNIMPAIRED

These few remarks help to clarify any discussion of "What the Anti-Trust Laws Should Be." The Sherman Anti-Trust Law, which is the basic law, has been on our statute book for nearly forty years. No change or qualification has been made in its major inhibitions. In another article, I call it the "Liberty Law" because it protects the nonconformist and assures everyone access to the markets of the nation; because it protects the right of the consumer to enjoy the free flow of articles into the markets of the nation, where he may exercise his sovereign right of choice. A distinguished representative of the Department of Justice declared that this Law represents a philosophy of human relations. This Law, therefore, is no arbitrary or undigested scheme, nor any transitory experiment. It is based on a real philosophy, congenial to the political philosophy of individualism, which is the essence of our Americanism, and has behind it the dignity of an honorable age. It has shaped the course of our industrial progress during a period of our most amazing industrial success and development, and therefore cannot be said to have retarded the growth of business, either large or small. Despite much criticism and discussion, our political psychology today is such that no bill introduced in the House or Senate looking to the repeal of the anti-trust laws would have the slightest chance of passage. We still fear oppression at the hands of concentrated economic power, and still have faith in the anti-trust laws as a protection against such possible oppression.

The courts have delivered themselves of numerous opinions in the application of this Law, and these opinions have shown considerable flexibility and regard for changing economic conditions. The decisions in the Standard Oil and American Tobacco cases reject the theory of absolute prohibition of combinations and establish a

"rule of reason," whereby the legality of the combination depends upon the reasonableness of its purpose and its conduct. The earlier decisions, forbidding trade associations from distributing trade data for the benefit of association members, have been clarified to permit active coöperation by the group looking to a better understanding of market conditions. The fear that strikes in factories producing goods for use in interstate commerce would be regarded as a violation of the Law, because they interrupt the supply of goods for interstate commerce, has proved groundless, and the ordinary industrial strike has thus been placed beyond the reach of this Law. Later decisions have shown a growing tolerance of industrial consolidations of great size, as long as they were so conducted as not to constitute a social menace. The growth of big business units and of big labor unions has certainly not been unduly curtailed. Both find a home in the United States.

NEED FOR DISSEMINATION OF FACTS

The conflicting arguments of those who are for or against the anti-trust laws, in many cases, involve most amusing situations. People arrive at the same conclusions from premises and assumed facts which are absolutely contradictory. Mr. Samuel Untermyer would repeal the anti-trust laws because they are ineffective. The American Federation of Labor would repeal them because they are too effective. The business man opposes them because they are too uncertain. Others find them too certain. Some people contend that these laws are causing the elimination of the small producers, while others contend that they protect the existence of such producers. This confusion of thought, as already pointed out, arises from the failure to analyze and differentiate the different aspects of these laws and their prohibitions against voluntary coöperation as compared with their prohibitions against interference with others.

But no appraisal of the value of the anti-trust laws, or most other laws so far as that is concerned, is adequate which does not take into account their deterrent effect. The silent operation of most laws, because the great majority of citizens accept them without resistance, are their greatest accomplishment, and the same is true of the anti-trust laws. Any lawyer experienced in this field, and having frequent contact with clients desiring advice upon the application of the anti-trust laws, knows that business men and labor unions are deterred by reason of the mere existence of these laws from carrying on many practices fraught with anti-social possibilities. The boycotts which unions have refrained from conducting, the destructive activities which business men in times of desperation would otherwise surely practice, price increases for the advantage of the producer and to the detriment of the consumer, the complete absorption of an entire industry under the control of one unified group, with power to dictate to society the terms of its essential service—all these, and many other developments of a similar nature, have been avoided, not through governmental prosecutions or private suits, but through the consciousness that any effort to put them into effect would lead to legal consequences of an unwelcome nature. Thus, it can be said, without fear of contradiction from those who are informed on this subject, that the anti-trust laws have played an important part in shaping our industrial institutions.

In brief, this gives us a picture of the fundamental and important nature of these laws, the extent to which they have withstood the test of nearly four

decades of trial, the social philosophy which lies behind them, the psychology which supports them, their flexibility as applied by the courts to changing conditions and their effect in shaping our industrial institutions, without destroying useful coöperation and the growth of big business and large labor unions.

NEED FOR PREVENTATIVE JUSTICE

There has always been a great deal of feeling on the part of many people that the line of demarcation between lawful and unlawful conduct under the anti-trust laws has been too uncertain, and that trade unionists and business men were obliged to conduct their business under the threat of criminal prosecution. This criticism is not without foundation, but the difficulties in correcting it are great. The Law condemns, in sweeping terms, all combinations in restraint of interstate trade, and the courts, by their construction over a period of forty years, have built up a body of jurisprudence which, in a very large degree, eliminates the uncertainty by elaborating on the meaning of the general language and applying it to a great variety of concrete situations. It does not seem possible to accomplish the far-reaching purpose of the Law and to specifically and concretely enumerate in the statute all of the details which shall constitute a violation of the Law. The Law, as it now stands, forbids illegal combination, regardless of the garb which it dons. It forbids a result, rather than the means of its accomplishment. A number of years ago, extensive hearings were held in Congress, attended by prominent business men, all with a view to securing a more definite standard of right and wrong, but the volumes of testimony given, the innumerable opinions and arguments advanced, merely disclosed the utter impracticability of supplying a more definite standard. In order to meet all the devices which the subtlety and ingenuity of man can devise, with a view to increasing his prices and profits, it seemed necessary to leave the prohibition of a general character, in order to make doubly sure that the Law should not be circumvented.

Bearing in mind, as we have stated, that there are twilight zones in the application of the anti-trust laws, it might be desirable to authorize some governmental agency to grant permits to combinations, upon the understanding that as long as the permit is outstanding there would be no criminal prosecution, but that the Department of Justice, at any time, would have the power to test the legality of the combination by a civil suit for injunction. After the courts had declared that the combination was unlawful, any attempt on the part of those concerned to continue the combination would, of course, subject them to the criminal provisions of the Law, but there no longer would be the legal uncertainty to criticize. This suggestion has been made by myself and others for many years past, and would be but an easy transition from the trade conference practice, already so popular between the Federal Trade Commission and some industries. It would, at least, do away with the feeling that the existence of the criminal provisions of the anti-trust laws creates a situation where business is carried on *in terrorem*.

Let us come now to the more fundamental question of the desirability of the substantive prohibitions of the anti-trust laws. The major consideration to be kept in mind is the fundamental distinction between voluntary and involuntary combinations, the voluntary combination, resting upon the willing coöperation of a group, and the coercive combination, carrying with it

the purpose of forcing others against their will to combine. Thus, when people speak of the right of voluntary association, they should not forget that this does not carry the right to promote involuntary associations. The right to organize carries with it the right to remain unorganized, or there is no such thing as industrial liberty.

COERCIVE COMBINATIONS

As long as this country adheres to its political and economic philosophy of individualism, it would seem that the anti-trust laws should prohibit combinations to injure others or combinations which artificially obstruct the free flow of goods to the market. Thus, the Danbury Hatters case, wherein the court used the phrase "liberty of the trader," disclosed a combination whereby no dealer was to be patronized who carried the Danbury hat. In this way, it was sought to exclude Danbury hats from the market and prevent the consumer who preferred them from purchasing them. It was an autocratic boycott, not a democratic boycott, which appealed merely to public opinion. It did not merely ask people not to buy a Danbury hat, but, by coercing the dealer not to carry the hat, absolutely deprived the consumer of freedom of choice.

The Stonecutters cases involved combinations in New York City whereby strikes were called on buildings to prevent the use of stone which was produced outside of the metropolitan area, with the result that, through the coercion of the combination, the metropolitan area was paying two or three times as much for its stone as it would be called upon to pay were the channels of interstate trade kept free and unobstructed.

A prominent manufacturer of machinery invents a machine of almost indispensable value, and then lays down the rule that he will not sell that machine to anyone who buys from any other concern unpatented machinery produced on the open market. Pipe manufacturers, plumbing contractors and the plumbers' union combine to exclude a new plumbing device which saves material and labor. Union contractors who use the device are fined by the contractors' association, and buildings where it is used are placed on strike. Thus, by this plan of exclusion, the manufacturer, the contractor and the journeymen prey upon the public. Electrical contractors agree to maintain prices, and arrange with the union to institute strikes against those who undersell. A large producer of one of the necessities of life, by fraud and deceit, secures control of its competitor's stock through a broker who obtains it as collateral, and then votes the stock to close the competitor's business.

Such coercive combinations aim at the exclusion of competitors and encroach upon the principle of industrial liberty. Whatever may be said about voluntary combinations, coercive arrangements such as these attack the liberties of our people, militate against the principles of our social institutions and are fraught with serious dangers. So far as one can peer into the future, it seems clear that the anti-trust laws should, for the protection of society as a whole, continue to protect the liberty of the trader as against such arrangements.

VOLUNTARY COMBINATIONS

We turn now to the other type of combination. The voluntary combination, prohibited by the anti-trust laws, usually takes the form of a merger or a group coöperating in price-fixing and the allocation of exclusive markets. Such combinations, in the majority of cases, whatever else may be said about them, are, as has

already been stated, restrained to moderation by the fear that any other course of conduct on their part will stimulate competition. Thus, the protection of the liberty of the trader is necessary not only because liberty is regarded as an essential, but because it keeps alive potential competition to restrain voluntary combinations from oppressive conduct. The danger of mischief from the voluntary combination is greatly reduced by the prohibition of combinations which interfere with the liberty of others.

But the problem of voluntary combinations is more complex than this, for it is not impossible for groups, exercising great power, voluntarily to maintain price agreements, or other kinds of arrangements, to the injury of the public. The question of the extent to which the anti-trust laws should prohibit arrangements of this kind opens a field for broad discussion. At present, however, it is quite clear that the public will not sanction price-fixing combinations, and thus dispense with the protection afforded by competition, unless some form of governmental supervision or regulation is interjected into the picture for public protection.

The same comments are also true in respect to mergers or consolidations, which are fraught with the same dangers, but in the case of mergers or consolidations, by reason of the technical questions of the law of conspiracy, there has grown up a broader tolerance of larger business units than there has of coöperative action on the part of units which otherwise continue their independent existence. Thus, a group of competitors may find sufficient economic reasons legally to justify the formation of a consolidated corporation, giving unified control, while the members of the same group would not be permitted to continue their independent existence and accomplish unified control as to merchandising through price agreements, allocation of territory, and so forth. So far, the courts have shown increasing liberality toward mergers, as long as they do not control too large a percentage of the total production, and increasing liberality towards voluntary coöperation on the part of competing producers, as long as they do not fix prices or allocate territory. The line is drawn against these voluntary arrangements when, by consolidation or by agreement, they prevent competition. The competitive condition is to be maintained as against all devices, voluntary or involuntary.

MINOR CHANGES CONSIDERED

Upon the whole, I see little reason to expect any radical change in these major features of our anti-trust laws as applied to ordinary industries. On the other hand, it has long been my feeling that there are certain concrete amendments which should be considered without affecting the general prohibitions of the Law in its application to ordinary business enterprise. The question of allowing the producer to fix the resale price of a special trade-marked article presents one of these situations. Today any systematic agreements, whereby Williams Shaving soap, Gillette razors, Old Gold cigarettes, or Ingersoll watches are sold upon the condition that they will be resold at the price fixed by the producer, constitute a violation of the Sherman Anti-Trust Law. There is grave doubt as to whether this is just or wise. Many people inquire why a producer, who, at any time, may discontinue his operations, should not be permitted to dictate the price at which an article bearing his trade name is sold by dealers to the public. To cut the price frequently destroys the standing of the trade-marked article, and tends to impair the good-will for which the producer has paid in advertising and good service. There has been a great deal of litigation over this question, with many dissenting opinions, but the application of the anti-trust laws to the situation forbids any thoroughgoing arrangements of this character, and many bills have been offered in Congress to revise the Law in this respect. An amendment of this character could be enacted without impairing the general usefulness of the anti-trust laws.

TREATMENT BY INDUSTRIES

There seems to be no good reason for applying the anti-trust laws to regulated public utilities and railroads. Certain other interests may now also become candidates for complete or qualified exemption. We are beginning to struggle with the problem presented by the relation of the anti-trust laws to our natural resources. If oil is wastefully produced through the overdevelopment of oil fields and the nation's supply of this valuable commodity is thereby placed in jeopardy, it is a question for serious consideration as to whether the laws should not permit agreements to curtail production under governmental supervision. From this, one naturally jumps to other natural resources like coal, lumber and metals. Should such an exception apply to all natural resources, or should it be limited, for the present at least, to meet the emergencies of the oil situation, with added exemptions by Congress from time to time in respect to other natural resources as circumstances may dictate? From the public's point of view, there is no need for legislation of this character in respect to bituminous coal mining, for the supply of bituminous coal is not in danger and the public is now consuming it at low prices dictated by competitive conditions. As to anthracite, the main public protection lies in the competition of substitute fuels, and the public, so protected, would benefit by a thoroughgoing internal organization of the production and distribution of anthracite.

This allusion to specific problems merely shows the difficulty of generalizing on the application of the anti-trust laws to natural resources.

INSISTENCE ON FAIR PLAY

The establishment of the Federal Trade Commission, with power to enjoin unfair methods of competition, represents a hopeful and interesting experiment. Its function is to stop all competitive practices which are deemed unfair, and thus to protect industry and the consuming public from all measures which are calculated to obstruct or thwart the fair and free play of competition. The first formal order issued by the Federal Trade Commission enjoined misbranding, or the use of a name of a fabric upon goods to which the name did not properly apply. Since that time, repeated cases have arisen of this character, thus enjoining, for illustration, the use of the word "silk" upon goods not made of the product of the silk worm, and the use of the word "wool" upon goods not made of wool. Misbranding of this character thwarts the normal competitive process by influencing the distribution of patronage not according to the inherent merit of the merchandise offered for sale, but according to false and confusing representations. It is like securing votes by fraudulent methods, for patronage is but a commercial vote in favor of the continuance in business of a particular producer.

Local price-cutting and selling below cost in a particular city for the purpose of destroying competitors; arrangements between several competitors successively to take contracts below cost in every city, so as to ruin still another competitor who must make all bids be-

low cost, or win no business; the establishment of "fighting brands," where prices are slashed for the purpose of injuring others; the establishment of companies which appear in the industrial arena as independents when, in fact, they are nothing but fighting agencies of an illegal combination; interfering with a competitor's supplies; simulating a competitor's product; destroying a competitor's credit; bribing a competitor's employees; and practicing espionage upon competitors' activities —these, and other practices, have likewise been enjoined on the ground that they interfere with that character of free and honest competition which is best for the interests of the consuming public. As was picturesquely stated by the Supreme Court of Massachusetts: "The trader has not a free lance. Fight he may, as a soldier, but not as a guerilla."

If, through governmental regulation, the rules of the game can be laid down so that, as the Englishman puts it, everybody will play "cricket," it may be possible to keep alive a condition of full and fair competition without further regulation or supervision by government. Figuratively speaking, the Government stands on the side lines in the industrial arena and bids the contestants to play the game to their utmost, provided they do not hit below the belt. This attitude toward the problem seems to be the one likely to enlist the hope and interest of our people in the immediate future, and one which should be patiently and thoroughly tried before seizing upon more radical measures. In it lie educational values, because it involves an intensive study of unfair business practices and the development of an ethical sense as to what is, or should be, regarded as unfair. Already, it has invigorated the ethical sense of some industries, and has led to the outlawry of practices which heretofore, and with little thought, have been accepted as the order of the day. The question naturally arises as to whether this intensive insistence upon the rules of fair play in industry does not hold greater social values than mere emphasis upon restrictions against combinations and mergers.

Book Department

REVIEWS: PAGE

REVIEWS:

Mergers and the Law. Pp. x, 153. New York: National Industrial Conference Board, Inc., 1929. $3.00.

Mergers in Industry. Pp. xiv, 205. New York: National Industrial Conference Board, Inc., 1929. $3.00.

TOULMIN, H. A., JR. *Millions in Mergers.* Pp. xv, 323. New York: B. C. Forbes Publishing Company, 1929. $3.50.

The first volume was prepared by Myron W. Watkins, of the Conference Board's Research Staff. In 153 interesting pages it carries either a lawyer or a layman through a subject which easily could be involved and tiresome under less skilful treatment. The book does not profess to be exhaustive, but it gives the reader an opportunity for a bird's-eye view, which is of value if one desires to investigate in detail the cases relating to mergers.

The development of public policy toward corporate consolidations is traced, and the modifications of the policy and its present status is touched upon, but without entering the controversial field of suggested revisions. In a brief opening chapter, the common law policy relating to combinations as developed in England, with the emphasis placed on the theory of *laissez faire* so that no corporate merger as such has ever been attacked in the English courts, is contrasted with the American doctrine that competition must be fostered, and that anything which stifles it is economic oppression—a policy which found legislative expression in the Sherman Act.

A second chapter traces the three stages of construction of the Sherman Act. From 1890 to 1904, corporate consolidations were not reached by the law; from 1904 to 1911, any combination of units formerly competing contravened the law; after 1911, industrial consolidations as such are not unlawful.

The so-called "rule of reason," as applied in a number of leading cases, is the subject of the longest and perhaps the most useful chapter. It is followed by a discussion of factors determining the lawfulness of business consolidations, showing the growing accommodation of judicial opinion to business expediency. The Federal legislation following the Sherman Act is analyzed.

The summary and conclusions bring out the rather surprising fact that in the thirty-seven years following the Sherman Act there have been four hundred and thirty-six suits predicated upon the provisions of the anti-trust laws decided by the courts. Of these suits, forty percent were prosecuted by the Federal Government. The author concludes that this record demonstrates the need for the protection of those engaged in interstate commerce against attacks by outsiders. On the other hand, one might conclude from the small number of suits in comparison with the size and complexity of modern business that the laws were observed to a surprising extent.

The need for certain exemptions from the Anti-Trust Law is pointed out, especially with respect to natural resource industries, where present competitive conditions lead to waste of natural resources, such as oil. With such exceptions, the final conclusion is that the present legal restriction is not excessively severe or repressive.

The whole treatment of the subject is suggestive and provocative of general discussion on this interesting subject, which must be helpful in the solution of problems hereafter arising.

The declared purpose of the second volume is to examine industrial consolidations from the point of view of economic theory as to some questions raised concerning this type of business organization. The scope is limited to consolidations where there is central control of a number of distinct operating units and where their products are marketed over wide areas. On the question whether such consolidations are good or evil from an economic standpoint, a present judgment is suspended, but the facts available to answer the question are briefly reviewed. In such consolidations high profits are promised to investors through economics of operation, efficient management and stabilized industry, so that the public is not injured.

One naturally asks whether such consolidations have been profitable through business efficiency. Have they shown technical efficiency? The inquiry is therefore directed to such aspects of consolidation as lend themselves readily to economic and statistical analysis, and the discussion is further limited to mergers in manufacturing industries.

After considering numerous statistics, the conclusion is reached that industrial consolidations have not provided a safe, sure and easy way to business success. Contrary to the popular conception, *successful consolidations are the exception and not the rule.* The book is apparently intended as a companion volume to *Mergers and the Law,* since it supplements that volume.

In *Millions in Mergers,* we learn from the title page that the author is of Toulmin and Toulmin, attorneys-at-law. A brief introduction has been written by C. M. Chester, Jr., President of General Foods Corporation. Mr. Chester reviews the book in his introduction, and cites his company as a successful example of the "circular" type of merger, composed of non-competitive organizations, as distinguished from the "horizontal" and "vertical" types—the former joining competitive units and the latter illustrated by the Ford Motor Company.

The need for an "up-to-the-minute" book on mergers for public consumption was apparently so urgent that the author makes his statements in what he calls "business language." This perhaps accounts for such phrases as "*genius and species*"; "*a presumptive of intent*"; "*mergers* by purchase . . . *is* far better"; and for a nomenclature which refers to "circular," "horizontal" and "vertical" types of mergers. Does it account for chapter headings such as "Are We in a Merger Mirage?" and "We Paint the Back Drop?"

The text in general is composed of short paragraphs, more or less disconnected—many of which are "business language" epigrams, such as, "Thus the motto of the United States is 'Out of Many, One'—not only politically, but in business"; "So in later years, just prior to 1862, good whiskey sold for fourteen cents a gallon, and there were no bootleggers"; "If there is any one certain road to success in building these skyscrapers of business, it is on the solid foundation of public service." In between these high spots is interspersed a sprinkling of statistics. The whole constitutes a scrapbook, which, as a good scrapbook should do, contains much interesting information and many practical suggestions. The chapters on "Shall We Enter a Merger?"; "How to Merge Companies"; "Why Do Mergers Fail?"; and "How to Make Mergers Pay," set forth in a popular manner an A-B-C outline of the subjects treated. They deal with fundamentals in a way that makes interesting and useful reading. Under the heading "Mergers and the Law" the author closes his treatise as follows:

"To determine what is a legal merger we must answer these questions:

(1) What are the motives for merger?
(2) Is it conducted on the principles of fair play?
(3) Does it render a public service?

Affirmative answers to these questions pass the merger legally."

The author leaves us in doubt as to how the first question can be answered affirmatively; but a book entitled "Millions in Mergers" is not written to explain everything, and after more than three hundred pages of business language some breathlessness is excusable.

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SEAGER, HENRY R., and GULICK, CHARLES A. *Trust and Corporation Problems.* Pp. xii, 719. New York: Harper and Brothers, 1929. $3.50.

Trust and Corporation Problems is a study in failures. The great failure is the lack of

intelligence on the part of ourselves and our Government in meeting these problems. The first and a most important failure has been that of the states when they forgot that a function of the state is the protection and the promotion of the public welfare and turned themselves into charter mills. Because corporations have been the instruments of the trust promoters, and because the dissolution of some of the trusts was brought about by the revocation of corporation charters, discussion of the problem begins by showing how competition between the states for revenue has resulted in a lowering of the bars with respect to corporation charters, and how no par stock, watered stock, irresponsible directors, inadequate protection of stockholders and the sale of fraudulent securities, holding companies and other problems of trust control, would never arise or could be prevented if *the states* could be brought to a realization of their duty, not only to their own citizens, but also to the citizens of the rest of the United States. One reads with amazement the easy methods of obtaining charters in some of the more lenient states.

The states have failed also with respect to the regulation of monopolies and unfair methods of competition. Many states do not even have such laws on their statute books. Others, if they do, do not take the law seriously, while still others, although they may take the law seriously, fail to accomplish anything of real value.

The second failure is that of the Federal Government in regulating trusts under the Sherman Act. The monopoly of the Standard Oil Companies was due to advantages in transportation, and even after the dissolution they continued to control transportation. If monopoly and community of interest no longer exist in the petroleum industry, it is not because of any Government decree, but because of the passing of the old leaders, the diffusion of stock ownership and the rise of powerful independent companies. Yet in 1928 "price competition is only sporadic, local or temporary." In the tobacco industry the decree dissolving the tobacco company merely placed different securities in the hands of the same group, and there is evidence to show that monopoly is again arising in the industry. The greatest misgivings arise with respect to our trust policy when we consider the United States Steel Corporation case. In summarizing the case the authors say: "When the opinions of the eleven justices of the two courts which heard the case are examined in some detail we find that seven of the eleven agreed that the 'Gary Dinners' were illegal, five of them believed the organizers acted illegally in forming it, but only three were willing to go the length of ordering its dissolution. . . . Just what restraint is exercised by the Sherman Anti-Trust Law as here interpreted? If we are to abandon any attempts to check 'good' trusts by dissolving them what remedy shall we seek for protection against 'Gary Dinners' and other forms of coöperation that may react to the disadvantage of consumers?".

The third failure is that of the Federal Trade Commission. The procedure of the Commission is faulty. The publication of its findings are inadequate and in some cases misleading. There is evidence of bias in some of their reports. Men have been appointed to the Commission who were out of sympathy with the very legislation that created the Commission. Despite these failures, which are not inherent in the structure and the theory of the Commission, it is commended by the authors and its abolition is opposed. Its record is good in many ways and it is a step forward in the solution of the problem.

The major portion of the book is devoted to the trust problems of the United States. The three chapters devoted to the problems as they occur in other countries, but particularly emphasizing the experiences of Germany, are of unusual interest. The German attitude toward trusts differs materially from our own. Combinations in restraint of trade, price-fixing, division of markets, in fact, most everything that we consider illegal, is permitted by Germany and then subjected to regulation. Where our states have fallen down in failing to protect against the abuses of lax corporation laws, the Germans have provided that all stock must be subscribed and paid for at par before the corporation is launched. An alternative method of having all stock subscribed for and only twenty-five percent paid in is so hedged about by restrictions that it is infrequently used. The only profit to the German promoters is that obtained by retaining the stock until its success is assured.

The remedies proposed by the authors are not new or startling. For the evils of the state incorporation laws, Federal licensing or incorporation is recommended. They show that it is impossible to deal adequately with the problems by a few laws written in general language. Laws must be passed with respect to the particular problems in an industry. An example is the petroleum industry, with its overproduction and its attempt to limit production by agreement, which now seems to be in violation of the law. They emphasize again the inadequacy of the courts to meet the problem. The legislation passed should be enforced by the Federal Trade Commission, having powers similar to those exercised by the Commission under the Webb Act, and also having the prestige of the Interstate Commerce Commission. Increasing publicity of accounts is urged. The dissemination of statistics of the various industries, not by the trade associations, where the privilege may be abused, but rather by some Government authority such as the Department of Commerce, is increasingly necessary. Contrary policies may be wise with respect to different industries. If the policy is one that tries to secure maximum social benefits it may sometimes require coöperation or even consolidation in some industries and the maintenance of competition in others.

The book contains an excellent bibliography.

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THOMPSON, WARREN S. *Danger Spots in World Population.* Pp. xi, 343, x. New York: Alfred A. Knopf, 1929. $4.00.

In this notable contribution to the literature on world population, Professor Thompson takes a comprehensive view of the entire surface of the globe, differentiating the countries thereon according to the position they hold with reference to the differential population pressures which are to be observed. Certain countries he regards as going through what he calls the "swarming" process. They are countries already with a dense population which are, nevertheless, experiencing such a rapid growth in numbers as to create acute problems for them and make them look with envy upon the thinly settled areas of the globe. Another group of countries includes those who have, for the most part, passed through the swarming process and find themselves today with large areas of land which they are not using intensively and are not likely to need in the future. A third group comprises those countries which have, to be sure, large areas of relatively unused land, but whose own expansion indicates the utilization of this land in the relatively near future.

The condition of unstable equilibrium thus set up constitutes one of the greatest menaces which threaten the tranquility of the world today. Unless this state of tension can be resolved, Professor Thompson believes that another great war is inevitable in the near future. He believes that the only permanent and efficacious remedy is to be found in birth control. But he believes that its adoption will be a matter of slow development in those very countries where population pressure is most crucial. Thus, it alone cannot be relied upon to forestall war. In the meantime, the author believes that there ought to be a voluntary relinquishment of land by those nations that have more than they can use to those who are in dire need.

Recognizing the high desirability of thus subjecting international affairs to an objective scientific analysis and predicting the probable outcome of present situations, and without pausing to comment on the somewhat idealistic nature of the immediate remedy proposed, there are one or two points in Professor Thompson's logical analysis that arouse some question. In the first place, he seems to assume that the "swarming" stage in the life of a people is inherent in its own development and will be reached and passed through when the appropriate time arrives, independent of external conditions. This is very doubtful. It seems much more probable that any people is likely to "swarm" whenever the rigorous pressure upon its population is re-

laxed, and to keep on swarming as long as the increase in numbers does not bring too obvious penalties. If this is true, the redistribution of land would merely prolong the swarming process, and eventually leave conditions worse than before.

In the second place, there is grave doubt as to the accuracy of the author's assumption that a growth of industry and prosperity tends to check the birth rate of a people. We do not know very much about birth rates before the nineteenth century, but as far as increase of population is concerned (which is the significant thing) the century which was distinguished by the industrialization of the western world and by an unprecedented growth in prosperity was also the century of the most phenomenal population growth the world has ever known. Is there any reason to suppose that a century of industrialization of the other hemisphere would produce an opposite result? These two considerations lead to a further query as to Professor Thompson's main thesis. Would it not be expedient and safe to insist upon birth control first, and then see what can be done to relieve overcrowded peoples by redistribution of land?

HENRY PRATT FAIRCHILD.
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The International Financial Position of the United States. Pp. xx, 276. New York: National Industrial Conference Board, Inc., 1929. $5.00.

The Economist of September 28, 1929, makes the well merited prediction that this treatise "will become a standard authority on this important subject." In any case, though an old story, it is not tritely told; and it is exceedingly well documented. The forty-six tables and two appendices make the treatise of high value for reference.

Mr. Young gives a brief sketch of America's international financial position for a century before the World War. He then records in detail the volcanic events that so suddenly transformed the world's deepest debtor nation into the world's greatest creditor nation.

The principal facts pertaining to the War debts are stated succinctly. That is to say, the subject matter is not limited to private financing.

The partial dependence of America's long-term capital exports upon its gold imports and upon its huge imports of short-term capital is clearly shown. The failure of gold imports to inflate American commodity prices is discussed. With the world's financial center moved into the dooryard of the New York Stock Exchange, security prices, more than commodity prices, seem likely to follow gold movements—to the confounding of classical theory.

Chapter VII, ostensibly on "Federal Reserve Operations and International Finance," is mostly a digression on domestic finance. It is, however, an able apology for Federal Reserve policy.

A serious defect in the treatise is the counting of income from previous investments as a capital movement ("capital payment"). This curious innovation was designed to show (1) that the domestic market has not been deprived of funds by our large exports of capital; (2) that the latter are hardly ever so large as the yield of previous investments; and (3) that, in effect, we have merely "plowed in" the yield of earlier investments. These facts could have been stated far more simply—without ignoring accepted terminology and repeatedly misleading the casual reader.

Two lesser defects might be mentioned: (1) On pp. 81–85 and 112 certain statistics on international short-term capital movements are somewhat discredited as "estimates." (2) On p. 73, and in footnote 20 on p. 275, War Finance Corporation advances to finance American exporters and to aid agriculture were counted as "War Debts and Credits," and treated as advances to foreigners not elsewhere recorded.

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Department of Commerce,
Washington, D. C.

RIPPY, J. FRED. *Rivalry of the United States and Great Britain over Latin America.* Pp. xi, 322. Baltimore: The Johns Hopkins Press, 1929. $2.75.

This interesting volume consists of the Albert Shaw Lectures on Diplomatic History delivered at the Johns Hopkins University in 1928. The period studied is that of 1808–1823, although in closing the author touches briefly upon developments since that time, developments which he has traced more fully in his valuable *Latin America in World Affairs* (New York, 1928). The first chapter sketches the leading political and economic issues of the period covered, and serves as an introduction to a detailed consideration of "The Destiny of the Spanish Borderlands"; "The Antagonism of Canning and Adams: Rivalry in Southern South America"; "Rivalry in Northern South America"; "Friction in Central America: the Panama Congress"; and "Spirited Contests in Mexico." A final chapter is entitled "Conclusion: A Century of Subsequent Contests."

The book is very carefully documented, and is a result of investigation of sources in both England and the United States. The method of treatment is primarily that of diplomatic history, as befits the author's specialty and the Albert Shaw Lectures, but Professor Rippy shows a constant appreciation of economic forces and figures, and achieves a nice balance between such things as forms of government and national sentiments on the one hand, and, on the other hand, such factors as trade, shipping, investments and commercial treaties.

Perhaps the most noteworthy truth evolved in the study is the fact that during this period "both [the United States and Great Britain] greatly magnified the economic and political importance of Spanish America." The reader is tempted to speculate as to whether the statesmen of the two powers were persons of unusual insight into the distant future or were simply mistaken about the immediate possibilities. Professor Rippy believes that "it may be doubted whether at the present time they [the Latin American states] have the importance which was attributed to them more than a hundred years ago," and his judgment is well supported. But he also brings out, especially in his concluding chapter, the much greater subsequent significance of the region to the two powers, and especially to the United States.

Some idea of the summary conclusions of the study may be obtained by citation of several sentences. "In the matter of commerce, England started somewhat behind the United States and came out in 1830 far in the lead." "So far as investments were concerned, the United States . . . was hardly in the race at all." "In the territorial phase of the contest England had little or no success." "The outcome of the maritime rivalry of the competitors is more difficult to ascertain. The development of the merchant marine of the United States was running that of England a fairly close race." "American diplomats succeeded . . . in writing into all of these [various] agreements their favorite provisions regarding the most-favored-nation principle, the shortening of contraband lists, the restriction of the power blockade and the inviolability of property on board neutral vessels." "In regard to political forms, it may be noted that the democratic republic prevailed in all Spanish America, and that this was due in no small measure to the moral influence of the United States." "In all that related to the matter of prestige England appears to have had some advantage."

As Professor Rippy points out, however, "in less than a century . . . the comparative position of the two rivals was virtually to be reversed. By that time the United States had taken the lead in the commerce of Hispanic America, though probably not in the affections of the Hispanic American peoples. Its political influence in the Western Hemisphere had become more powerful than that of its rival; its wealth, its significance in world politics, its investments in the lands to the south had equaled, and were threatening to surpass those of England." The student of present-day conditions may be inclined to the belief that this century-later result has been of considerable importance to the United States. If "Old World" political influence had penetrated Latin America the political destiny of the United States might have been very different. And in economic affairs such things as oil and investments and the likelihood of further growth of trade do much to sustain the popular notion of the increasing significance, actual and potential, of the Hispanic countries to the south of this republic.

Professor Rippy's book is a scholarly contribution to the literature of diplomatic his-

tory. In addition, it furnishes an illuminating background for present-day analysis of the political and economic relations of the United States and Great Britain in Latin America.

JOHN DONALDSON.
George Washington University.

The American Merchant Marine Problem. Pp. xiv, 167. New York: The National Industrial Conference Board, Inc., 1929. $2.50.

This book is one of a series of studies of international economic problems, most of them with special reference to the position of the United States, other numbers including *A Picture of World Economic Conditions at the Beginning of 1929*, *The International Financial Position of the United States* and *The Foreign Trade of the United States*. It was prepared by Mr. H. K. Murphey of the Board's Research Staff, under the supervision of the Staff Economic Council and with the coöperation of the Board's advisory committee of prominent business and professional men. The conclusions "are those of the Conference Board as a body." Special data were supplied by Mr. Alfred H. Haag, Director of the Bureau of Research of the United States Shipping Board, and thirty-four statistical tables and four charts are included.

An introductory chapter deals with basic considerations, and touches upon such fundamental points as the influence of the commercial geography of a country upon its shipping, shipping as an industry, shipping in relation to foreign trade and the place of shipping among other international business relationships. Part I consists mainly of a survey of the actual size, type and operations of the American merchant marine, public and private, with some mention of the laws concerning it. The chapters in Part II consider favorable and unfavorable factors, economic and governmental, affecting it. Part III treats, in logical order, various suggested measures for aiding it; these consist of subsidies and subventions of several types, of different sorts of preferential treatment of American vessels and of miscellaneous special measures. A concluding chapter offers a summary and conclusions, and appendices give definitions of technical terms and a list of American companies operating privately owned American vessels.

This compact, concise book is replete with up-to-date statistical and other information, is well arranged and is carefully and usefully documented. The facts are analyzed clearly, and are subjected to well balanced reasoning. Of importance is the fundamental distinction drawn between shipping as an industry, shipping as an aid to foreign trade, and shipping as an auxiliary of national defense. The reader is inclined to anticipate a cut-and-dried program arbitrarily set forth as a solution of the entire problem. But the book is peculiarly free from either scholastic or business prejudices. Arguments for and against each proposed method of Government aid are weighed impartially, and room is left for the belief that the solution of the American merchant marine problem does not lie in some one ideal governmental scheme, and indeed is to be found, to a considerable extent, only in purely ("natural") economic developments.

Since the volume surveys so concisely yet comprehensively the available information on the subject, the reader might wish it had contained a slightly more detailed treatment of the merchant marine acts of 1920 and 1928, and, especially, a fuller account, for comparative purposes, of the merchant marine policies of other leading nations and of their degree of success. As to the latter point, however, it must be recalled that the book does not purport to deal with foreign countries, and that the latest edition of "Government Aid to Merchant Shipping," published by the Department of Commerce, covers the policies of other nations in great detail though in much less succinct fashion.

Consideration of the relative place of American and foreign shipping services in the balance of international payments of the United States, and the consequent relation of merchant marine policy to such things as foreign investments and the tariff, has been very sensibly included. This attempt to weave shipping into the general picture of foreign economic relations as a whole is most useful, even though the necessity of so adjusting trade, shipping and financial policies that each may allow for the other may be a controversial question, on the ground that by its very nature the balance of international payments always balances. In any event a relative lessening of the American debit item for freight payments to foreign ships must be offset by a proportional increase in some other debit account or decrease in some other credit item, and vice versa.

By reason of its careful analysis, and particularly of its complete and condensed assembling of up-to-date facts, this book provides an almost indispensable reference work on the American merchant marine problem and a valuable addition to available information on the external economic processes and policies of the United States which, in general, are of unusual importance in the present era.

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BLACHLY, FREDERICK F., and OATMAN, MIRIAM E. *The Government and Administration of Germany.* Pp. xiv, 770. Baltimore: The Johns Hopkins Press, 1928. $5.00.

The contribution which the authors have made lies chiefly on the administrative side of their subject. The material on constitutional law and legislative procedure is a good background for the administrative data and makes the work a more complete whole. This is a departure from the usual policy of the Institute for Government Research, which has given us highly specialized monographs in limited fields. The present book is an admirable general picture of the German system of government and deserves a broad reading circle on its own merits. Those who are interested in administrative science, however, will wish that the authors had omitted the more general parts of the book and, following the usual policy of the Institute, had confined their attention to German national, state and local administration. If so, they would have been able to give us a more detailed and valuable discussion of this field, rather than a general picture.

The work describes the constitutional, legislative and administrative sides of the Reich, the principal states and the typical systems of local government. There are special chapters on Public Finance, Police Functions, Justice, Administrative Courts, Educational Administration, Regulation of Business and Insurance.

There is an interesting discussion of the administrative authority of the President, the Chancellor and the Cabinet. The latter is seldom composed of less than three or four blocs. The most interesting department is the Finance Ministry, because the levy and collection of nearly all important taxes is conducted by national agents. This includes the appraisal or valuation of property. The national treasury employs highly skilled financial experts in this work, thereby avoiding the ineptitude, the bungling and the political favoritism which pervade the state and local taxation of America. The German states receive a large part of their income from the Reich by direct appropriation. All this means centralization, which is now so earnestly decried in America, but the Germans have successfully met this difficulty by establishing numerous advisory committees of laymen who represent the taxpayers' interest both in the making of regulations and in their interpretation. Tax administration is, therefore, in close touch with the sentiments of the taxpayer.

The administration of many national laws is turned over to the states and the local bodies. This does not mean a general free-for-all interpretation of national law. On the contrary, national officers directly supervise and, if necessary, control the local administration of national measures, thus assuring reasonable uniformity and efficiency. The local administration is governed not only by state law, but also by national uniform laws on officers, voting qualifications, proportional representation and by the national administrative supervision. Another contrast with American conditions lies in the thoroughgoing state supervision of local administration and accounts, a system which many in this country now favor. German local and city government is, however, far too complicated and lacks reasonable uniformity. There is a strong movement for a national reorganization along more uniform lines. Nevertheless, even under the present sys-

tem there is an active participation of citizens in local affairs and the local governments are effectively and honestly administered.

The law of public officers gives to the "Beamten" a special local position, special privileges, duties and responsibilities. The educational system and the requirements for admission to the service are well integrated and the attractiveness and traditions of the career far out-weigh any temptation to dishonesty or misconduct.

When, in 1927, a salary increase was proposed, the Minister of Finance, in favoring it, was able to say, "All business elements also agree with the Government, that there can be no more serious impediment to the work of reconstruction than the decline of German officialdom, renowned for its devotion to duty, and its integrity, into a state of unreliability."

There is an interesting and helpful discussion of administrative courts in which the states protect the rights of individuals when attacked by administrative action. The authors set up the following interesting tests of the German system: Is the system democratic? Is the government properly organized? Is it adequately controlled? Is it manned by a strong personnel? Is it powerful and effective?

Except as to the structure or organization of administrative courts and local government, the authors conclude favorably on all these points. Their judgment seems well considered and sound.

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SCHOCH, MAGDALENE (Ed.). *Die Entscheidungen des Internationalen Schiedsgerichts zur Auslegung des Dawes-Plans* (Politische Wissenschaft, Heft 3). Pp. xvi, 150. Berlin-Grunewald: Dr. Walther Rothschild, 1929. M.10.

———. *Die Entscheidungen des Internationalen Schiedsgerichts zur Auslegung des Dawes-Plans* (Politische Wissenschaft, Heft 9). Pp. xvi, 133. Berlin-Grunewald: Dr. Walther Rothschild, 1929. M.8.

These two volumes complete a series of four devoted to the decisions of the arbitral tribunal set up by the London Agreements of 1924 for the decision of disputes under the Dawes Plan. The first two (volumes 2 and 4) dealt with the question of the inclusion of the social insurance payments of Alsace-Lorraine and Silesia in the Dawes annuities, as well as the liquidation of German property abroad. Volume 9 carries the latter through to its final Award, while volume 3 gives the Award on the civil and military pensions in Alsace-Lorraine, as well as the cases of a number of special deliveries in kind. The editor (Dr. Magdalene Schoch) has done a fine piece of work in documenting the complete series with pleadings, official arguments, and so forth, and in supplying a critical appreciation of the Awards. The fact that most of the cases were decided against the German Government undoubtedly was one of the major factors in creating a public opinion in Germany favorable to a revision of the Dawes Plan, as it was felt that the original burden of the annuities was gradually being augmented beyond the capacity of the country. The Tribunal, composed of economists and prominent business men quite as much as of lawyers, was generally inclined to take a "business" view of some of the juristic pleas of the German Government (see, for instance, paragraph 14, of the opinion on the liquidation of German property, Award No. III); but did not carry its reasoning along this line far enough to include a consideration for the main purpose of the First Committee of Experts, to wit, the limitation of the burden to an amount which would not endanger the stability of the new German currency.

In the Young Plan the arbitral machinery of the Dawes Plan has been preserved, and the clarification and definition of terminology which has resulted from the three sessions of the Hague Tribunal is therefore likely to be of lasting benefit in the further development of the reparation problem. The future historian of the financial liquidation of the War will no doubt attach great value to these interpretations of mooted passages in the Dawes Plan, because of their bearing on the drafting of the report of the Young Committee. The discussions provoked by the British refusal to return the German private property confiscated during the War are also clearly conditioned by the decisions of the Hague Tribunal. It seems quite possible that some of these decisions will have a marked influence on the development of the international law concerning foreign property and investments.

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PATTERSON, CALEB PERRY. *American Government.* Pp. viii, 888. New York: D. C. Heath and Company, 1929.

MAXEY, CHESTER C. *Urban Democracy.* Pp. vi, 408. New York: D. C. Heath and Company, 1929. $3.20.

In the college of the future, of which educational idealists so fondly dream, there will be no need for textbooks. But unless all signs fail, this idyllic state is far ahead of us, and in the meantime, textbooks will fill a real need. This is particularly true in the field of government where the scene changes so rapidly as to require a fresh portrayal for each college generation. To produce well proportioned, thought-provoking and readable texts is a task requiring considerable skill, especially since it is difficult to avoid an approach which has become conventional. The first book before us meets every reasonable test which one could impose. In his *American Government*, Professor Patterson has written a text which, while well documented, avoids the pedantic striving for strict accuracy of statement which disfigures many books with a similar purpose. Space is well proportioned and, in view of the vast field covered, the attempt to stress the functional approach is successful. Above all, the book is as readable as it could well be, although, from this point of view, it suffers from the cutting up of each chapter into numerous sub-heads. The whole field of American government is discussed, but that part devoted to local government seems scanty and somewhat in the nature of an afterthought, although it swells the book to a total of nearly nine hundred pages. Such a large volume is likely to appear formidable to the undergraduate, but it is no doubt necessary to tell the whole story. Large sales mean that the book must reach colleges where it will be the main stock in trade of the teacher, perhaps, as well as of the students.

In Professor Maxey's *Urban Democracy* the usual story of municipal government and administration is told with a bit more vivacity than is usually brought to the subject, but surely with little novelty. The reviewer is of the opinion that the author missed an opportunity to provide a fascinating introduction to the subject in his first five chapters—"What is a City?"; "The City as a Factor in Civilization"; "The Urbanization of the Modern World"; "Some Social and Economic Aspects of Urban Life"; and "Some Political Aspects of Urbanization." As they stand, these chapters do not make the most of their subject matter and are too brief—thirty-eight pages in all—to be more than mildly suggestive. A different treatment here would have done a good deal to create the enthusiasm needed to carry the student through what is at best usually a rather arid discussion of street paving, sewage disposal and municipal budgeting. As for the rest of the book, it seems to be based very largely upon other standard texts in the field and deals in the conventional way with the usual problems of structure and function. On the other hand, the style is readable and some of the chapters, for example those on the "Problems of Administration and Municipal Utilities," seem to the reviewer to contain a good deal of sound understanding.

LANE W. LANCASTER.
Wesleyan University,
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THALHEIM, KARL C. *Sozialkritik und Sozialreform bei Abbe, Rathenau und Ford.* Pp. 132. Berlin: Reimar Hobbing Verlag, 1929.

This small volume is an appraisal of the industrial principles and practices of Ernst Abbe (1840–1905), Walther Rathenau (1867–1922) and Henry Ford (1863–). Abbe was a professor of physics at Jena, and later sole owner of the Zeiss optical works in that city. He reorganized his plant as a coöperative enterprise in the profits of which the officials, the workmen and the University of Jena participated. Abbe invented the refractometer and made many improvements in the microscope and photometric lenses.

Rathenau was both an industrialist and a statesman: by training he was both an idealist and a capitalist, and held that "consumption, like all enormous activities, is not an individual but a communal affair," that "the equalization of property and income is prescribed by ethics and by economics," and that the restriction of the right of inheritance in conjunction with the equalization of popular education at a higher level would break down the barriers which separate the economic classes of society and thus put an end to the hereditary enslavement of the lower groups.

The thought of Abbe, Rathneau and Ford shows so many similarities that a superficial observer might put them on the same plane. Thalheim's book deals with this similarity of views regarding industry and reaches the conclusion that Abbe and Rathenau followed a similar ideal and philosophy of management, but that Henry Ford is of an entirely different ilk in his economic thinking. In the author's opinion, German judgment along industrial lines has suffered from "Amerika—Inflation," and consequently Henry Ford and his philosophy have been overpraised in Germany, while Abbe's great contributions have been forgotten.

The industrial policy advocated and followed by Ford is not applicable to Germany. The German mind and temperament do not constitute fertile soil for Ford's utilitarianism and pragmatism as they do for the more philosophical and ethical ideals of Abbe and Rathenau.

The six chapters of this book deal exclusively with the work of these three men. The author says he stands aghast when he sees how low is Ford's cultural ideal. This typical American captain of industry sees economic progress as the end of industrial effort, while Abbe and Rathenau regard industrial advance merely as a means to an end. With them, the end is rather a higher level of culture than a higher level of living. In the eyes of the author the following from Henry Ford's *Life and Works* (p. 5) epitomizes Ford's industrial philosophy: "Liberty is the right to work a reasonable period each day, and to receive for this labor a suitable and sufficient wage, and then to be able to order the details of one's daily living as one will." Again, "Whether a high level of living signifies high culture, we do not know, but we believe that a culture which expresses itself in material well-being must point to a certain measure of intellectual welfare." The Fordian dictum, "Thou shalt not fear for the future nor overreverence the past," is held to be part and parcel of the industrial philosophy of a land in which economic prosperity has until recently been valued more highly than culture. Ford's philosophy of life is summed up in Thalheim's book as: Prosperity and external well-being. Against this, Abbe and Rathenau, and the German people whom they represent, would rebel. Their ideal in industry is rather Justice and Duty.

Thus, Ford stands over against Abbe and Rathenau. To him the great desideratum is utilitarianism and the greatest good to the greatest number. To them this is a low ideal. Rathenau would phrase his ideal (Rathenau, *Von kommenden Dingen*, p. 75): "We strive for the development of the soul in an inner world; through this development we shall then free ourselves from the inherited serfdom in the external world. . . . It is not a question of equalizing the distribution of economic goods in the world, nor of making all men independent, well off, of equal station, or happy. It is rather a question of removing men from the compulsion of present-day blind and relentless industrial organization and giving them the right of self-determination, together with responsibility for their own economic welfare. It is not a question of forcing liberty upon the individual life, but of opening up a way to it. Whatever industrial and cultural hardships this demands are of little moment, since it is not expediency and advantage which we seek but rather divine law."

Chapters on Wages, Unemployment, Working Conditions and Industrial Enterprise present compactly the ideas of the three industrialists in their fields. The bibliography is excellent; the list of writings dealing with Henry Ford is particularly valuable to Americans because all the nineteen discussions are German appraisals of him and his work.

Thus are contrasted the two varying ideals of the United States and Germany. The analysis throughout the work shows insight. As an interpretation of national psychology in Germany and the United States, this book is a masterpiece and deserves translation into English.

HARRY T. COLLINGS.

University of Pennsylvania.

GOOCH, G. P., and TEMPERLEY, HAROLD (Eds.). *The Anglo-Russian Rapprochement, 1903–1907*. Pp. lii, 656. London: H. M. Stationery Office, 1929. 12s. 6d. (Volume IV of *British Documents on the Origins of the War, 1898–1914*.)

This volume of the series of British diplomatic documents concerned with the background of the World War contains almost exclusively materials bearing upon the Anglo-Russian Entente. The first chapter discloses many delicate problems arising out of the Russo-Japanese War, including the British point of view of Roosevelt's mediation. The renewal of the Anglo-Japanese Alliance is presented in the second chapter. Anglo-Russian relations from 1903 to 1907 occupy five chapters, ending with the reception by the Great Powers of the news of the Anglo-Russian convention of October 31, 1907. This volume is particularly important as the first presentation of the replacement of Anglo-Russian ill-feeling by a friendly working arrangement. Accordingly, its importance in a series on the Origins of the World War cannot be overestimated.

W. LEON GODSHALL.

Union College.

DUBROWSKI, S. *Die Bauernbewegung in der Russischen Revolution, 1917*. Pp. 206. Berlin: Verlagsbuchhandlung Paul Parey, 1929. M.6.

This work constitutes the first volume of a new series of popular, scientific publications prepared under the auspices of the International Agrarian Institute of Moscow. It traces, chronologically, the part played by the Russian peasants in the Revolutionary movements from the first peasant uprising under Bolotnikow, in the seventeenth century, to the final peasant Revolution against the landlords in 1917.

With the aid of hitherto unpublished source materials taken from Russian archives, the author has prepared a series of chronological as well as geographic tables, which reflect the nature, extent, purpose and location of the many peasant uprisings in Russia prior to 1917. These statistical tabulations should prove invaluable materials to the student of Russian economic and political history, even though he may be hampered by linguistic barriers. They make possible a comprehensive survey of the extent to which the Russian peasants carried on their struggles for several centuries to obtain possession of land.

Of particular interest is the author's graphic portrayal of the interrelation between industrial labor strikes and peasant uprisings from 1901 to 1917 (pp. 41 and 53). These two movements have apparently proceeded simultaneously since the beginning of the present century, but the class struggle between peasant and landlord antedated industrial conflicts by almost three centuries. The author has helped to dispel the impression that the Russian Revolutionary movement was largely an urban proletarian movement. The Russian peasant has apparently not been a mere passive agent in the class struggle at any time.

It is gratifying to find treatises such as this emanating from Russia, intended to give authoritative and accurate accounts of historic events, without injecting too much of the personal element into the narrative. Only in the concluding pages, the author shows his leanings distinctly when he maintains that none but the Bolshevist party really understood and appreciated the Russian peasant problems. We cannot share the optimistic note as to the success of Bolshevist policy with reference to these problems (pp. 191 ff.). Time alone will tell how the peasants will react to the elaborated plan for socialized agriculture, after they have enjoyed exclusive use of definite parcels of land for only a little over a decade.

KARL SCHOLZ.

University of Pennsylvania.

The Work of the International Labor Organization. Pp. xii, 197. New York: National Industrial Conference Board, Inc., 1928. $2.50.

In 1922, this Conference Board, a federation of American employers' associa-

tions, published a volume on the first two years of the International Labor Organization of Geneva. Six years later comes this second volume on its work. Apparently the subject interests employers.

This second volume describes again the "Structure" of the International Labor Organization and reviews in convenient form all of the subjects passed upon in the first nine years of the official international labor conferences—whether applicable to industry and commerce, to maritime and migration conditions or to agriculture.

Aside from the analysis of the twenty-five conventions and twenty-nine recommendations proposed to the fifty-five member nations of the International Labor Organization, interest in this report centers chiefly around the conclusions of the Conference Board as to the effectiveness of the International Labor Organization and the desirability of giving it encouragement.

That "the accomplishments of that agency in the field of international labor legislation have been relatively small," is the Conference Board's principal finding. The most important proposals have been least acceptable to member nations; often the proposals have not been in advance of existing legislation; many have been adopted chiefly by the least industrial of countries, and when approved there is no assurance in information available from the International Labor Organization that adequate enforcing provisions have been included.

The Conference Board looks with more approval upon the International Labor Organization as a "fact-finding and research agency" and concludes: "Affiliation of this country with the International Labor Organization does not at present seem necessary or desirable, but coöperation in the research activities of the International Labor Office and in an exchange of information and views is not only practicable but also desirable and should be encouraged."

JOHN B. ANDREWS.

ODUM, HOWARD W., and JOCHER, KATHARINE. *An Introduction to Social Research*. Pp. xiv, 488. New York: Henry Holt and Company, 1929. $4.00.

This most recent addition to the American Social Science Series is a welcome departure from the usual approach to social research. Beginning with explicit treatment of the various concepts of general science and contrasting the several methods of science, it presents the relation of the social to the physical sciences, and particularly the interrelations of the social sciences among themselves.

After indicating through illustration the range of social research and the essentially varied point of view that is necessary for a thorough attack on any of the problems of social science, the volume proceeds to an analysis of the several possible types of approach, to wit, the philosophical, the general analogical, the biological, the psychological, the anthropological, the politico-juristic, the economic and the sociological. Six types of method are recognized, the historical, the case, the survey, the experimental, the statistical and the scientific-human, and each is dealt with in considerable detail, although particularized techniques are largely omitted under these specific headings. The concluding chapters of the book deal with types of procedure: the utilization of personnel and commonsense technique; exploration of sources; utilization of available aids; analyzing, interpreting and presenting results; social analysis and the social denominator. The book concludes with a representative bibliography.

The authors are peculiarly equipped to treat this extremely broad subject because of their intimate contacts with the large number of bodies engaged in the supervision of research projects throughout the country. They have very successfully and convincingly presented, by brief citations, the whole range of authoritative opinion on the various topics treated, supplemented by much valuable illustrative material drawn from practically the entire field of actual social research. The volume is completely annotated for more detailed study of such sections as may be of special interest to the individual reader.

Integration of so varied a mass of material is difficult to achieve. The authors have accomplished this to a surprising degree by recurrent use of illustrations centering about the special problems of population, war, the family and regional studies.

Anyone picking up the book for a Sunday afternoon's leisurely reading will be disappointed. The volume is decidedly "meaty" and by the same token not easily read. Further, it can in no way be taken as a handbook in research technique. It is, however, a splendid and helpful guide to one engaged in research and is a volume which should be carefully studied in all seminars engaged in research or discussion of scientific methods.

FRANK ALEXANDER ROSS.
Columbia University.

FLORENCE, P. SARGANT. *The Statistical Method in Economics and Political Science: A Treatise on the Quantitative and Institutional Approach to Social and Industrial Relations*. Pp. xxiv, 521. New York: Harcourt, Brace and Company (The International Library of Psychology, Philosophy and Scientific Method), 1929. $7.50.

This is not merely another textbook, as the name might suggest. It is a contribution of the first rank to the structural philosophy of realistic social science. First announced by the publishers in nineteen twenty-three or four, its tardy appearance has been amply justified if the delay has contributed to the maturity of thought, the brilliance of insight and the pleasing literary exposition which characterize it. The immediate influence of the book, if one may prophesy, will be most far-reaching in political science, for this discipline has hitherto been but slightly affected by the philosophy underlying quantitative method. If it is of less far-reaching influence upon economics and sociology, this should be due only to the already extensive development, particularly in the former, of concepts permitting quantitative statement. However, it is the author's formulation of *relationships*, hitherto obscure, subsisting among the social sciences which gives his work its wider significance.

Political science and economics (to follow the analysis) have been distinguished by two cross-cutting lines of cleavage: the study of *organization*, when collective behavior is based upon the sanction of *compulsion*, has resulted in the science of politics proper. The study of the *terms* involved (rates and quantities), when collective behavior is based upon the sanction of *voluntary exchange*, has resulted in the science of pure economics. But the remaining two compartments in the manifold have been comparatively neglected. Study of terms when the sanction of compulsion is invoked produces *political economics* (or administrative science). Study of organization, when the sanction of voluntary exchange applies, produces *economic politics* (or the study of industrial organization). Outside of this 2 x 2 classification are interests and sanctions within the domain of sociology.

The case approach (as the reviewer chooses to call it), which is so generally employed in sociology and political science, must give way to the statistical approach in developing these largely unexplored fields. The preliminary necessity is that of analysis. "If we are to proceed to a scientific discipline like geology or sociology, accurate summarization of the itemized individual ways of behaving into varieties and tendency and combinations of behavior must follow, and this must proceed by statistical methods of measurement." In Chapters XIX and XX, covering one hundred and thirty pages, the author attempts, with detailed, itemized and illustrated specifications "to provide for statistical politics the analytic framework and the apparatus of thought, that economic theory (when suitably modified . . .) already provides for statistical economics." In this he concentrates "upon the study of organization of all kinds, industrial as well as State or 'civic'" (i.e., upon economic politics and political science proper), although much attention is also paid to political economics or administrative science. By finding "political" behavior in fields additional to the State, the author puts himself in alignment with the position recently taken by George E. G. Catlin in *The Science and Method of Politics*.

In arrangement, the book contains first (Part I, 47 pp.) a short discursus on the "mood and matter of statistical inquiry." Parts II, III and IV contain, respectively: the methods of statistical measurement; the principles to be followed and fallacies to be avoided in applying these measures to economic and political fields; and the resultant construction of a statistical eco-

nomics and politics. In its numerous aids to the reader—cross references, tabular and diagrammatic illustration, documentation, topical organization, and the like—the book is a delight and in some respects unique. A table of contents of fourteen pages provides at the same time an outline of the argument of each chapter section. A glossary contains not merely definitions of the statistical terms employed, but statistical formulæ and illustrations of their use. Finally, and in addition to the customary index, a concluding chapter is devoted to a logically developed "systematic index of economic and political issues statistically approached," with a complete table of cross references.

All social scientists who are interested in the premises of their field, whether statistically-minded or otherwise, should take account of this book.

STUART A. RICE.

University of Pennsylvania.

General Sales or Turnover Taxation. Pp. xv, 204. New York: National Industrial Conference Board, Inc., 1929. $2.50.

This study was undertaken, according to the foreword, because of its timeliness, and because of the dearth of information in this country regarding the possibilities and limitations of the sales tax. Concerning the paucity of information in English on the sales tax there can be no doubt. The present study is a useful contribution toward filling the gap, including, as it does, chapters of substantial length on such topics as Economic and Social Aspects, Constitutional Aspects and Administrative Aspects, together with other chapters on the Application of Sales Taxes, Luxury Turnover Taxes, and a lengthy Appendix on foreign turnover taxes. The results of various hybrid and mongrel sales tax experiments in the United States are also summarized.

Greater doubt may exist as to its timeliness, in the sense intended, although the net effect of this study may be that of hastening the confirmation of the suggestion, almost a prophecy, that a general sales or turnover tax might be enacted in several states within a few years. In support of the pertinence of the undertaking, Professor Seligman's statement before the Senate Finance Committee in 1921, to the effect that a general sales tax constitutes the "last resort of those countries which find themselves in such difficulties that they must subordinate all other principles of taxation to the one principle of adequacy," is declared to be an exaggeration. The sales tax, in one form or another, it is said, has become a "major element" in the tax systems of all European powers, except Great Britain, and in the tax systems, as well, of many minor European countries. Obviously the number of countries using such a tax has nothing to do with the matter. It certainly does not show that they have regarded other principles than adequacy. In fact, the financial difficulties of many European countries, major and minor, confirm Seligman's criticism. Adequacy is all they ask of a tax.

Some of the states may be approaching the point at which, whether through lack of sound leadership, the existence of an *impasse* arising from a deadlock of interests, downright extravagance or general laziness, they are ready to throw overboard everything but adequacy. The question may be timely in such quarters.

Those who have been drawn to the sales tax by its alleged simplicity will be somewhat disillusioned if they read this study carefully. Realizing the undesirable economic and social effects of a tax that falls most heavily on those with the lowest incomes, sales tax proponents have elaborated with patience and ingenuity many selective possibilities as to rates, exemptions, taxable objects and other discriminations, in order to bend this tax somewhat into conformity with ability to pay. The result, if it be practicable at all, is a hodgepodge based on arbitrary assumptions and guesses. The taxation of net incomes involves some guesswork; but a net income tax is as simple and as lucid as the multiplication table, compared with the result that is obtained in an effort to approximate taxation of net incomes by means of an elaborate scheme of discriminatory rates on gross sales, or turnover, flanked on one side by exemptions and on the other by supplementary taxes on "luxury" turnover. The chapter on luxury turnover taxes is disappointing. It indicates the difficulties, but solves none of them. The same must be said of the discussion of administration.

Yet this tax is suggested as a means of relieving property from a part of its present load.

The strongest impression derived from reading this book is that it leans decidedly toward the sales tax. It is almost propagandist literature. Both sides of the case are stated, to be sure, but the objections are rendered *pianissimo*. Before accepting a new tax of this sort, the objections should be examined with merciless rigor. The criticisms of the sales tax in this study have the expostulatory vigor of a "Tut, Tut!" as compared with a Jovian thunderbolt. The concluding sentence is significant: "It is possible that, *its practicability assured*, and due allowance being made for the social distribution of the general burden, the states, and possibly, city governments, will turn in growing numbers to the general sales tax as a fresh source of revenue" (p. 160. Italics by the reviewer).

Does this study determine the issue of practicability? It does not. It pussyfoots around such a double-barreled dilemma as the following, which is really the core of the problem:

(1) The more nearly universal the tax and the more nearly uniform the rate,
   (a) the simpler the administration, but
   (b) the greater the relative burden on the lower income classes.
(2) The more selective the tax as to rates and classes of taxable objects,
   (a) the greater the administrative difficulties, but
   (b) the greater the possibility of social equalization.

Although this book is an undertaking to show that the general sales tax is not as black as Seligman has painted it, the reader who is not mislead by what is found between the lines will decide that Seligman's black was, after all, only a gray.

H. L. LUTZ.

Princeton University.

ALFORD, L. P. *Laws of Management Applied to Manufacturing.* Pp. iv, 266. New York: The Ronald Press Company, 1928. $4.00.

The author of this book, an industrial engineer of distinction, has undertaken to set forth the fundamental principles of management as applied to manufacturing. Out of "the complexities of present-day manufacturing, the maze of systems, the innumerable variations of method," he seeks to formulate those underlying fundamentals that have been developed through "the long process of thought and experience."

Essentially he continues the work of those engineers who have set forth the current experience of manufacturing in the form of maxims or rules, which they call principles. But whereas F. W. Taylor listed four fundamental principles of management, and Harrington Emerson twelve, Mr. Alford has collected as many as fifty. He prefers to call them laws rather than principles.

These laws he classifies and discusses in detail, such as laws of leadership, laws of production management, laws of wage payment, laws of safety and maintenance, and so forth.

It is a pity there is not a greater uniformity of usage in regard to the much abused word "law." In the sciences, including the social sciences, law means observed sequence or a statement of cause and effect. And Mr. Alford would seem to aim at this usage, since he describes his laws (p. 46) as resistant to change, universal in application, imperative to the highest success. Actually his fifty laws display a good deal of variety of meaning.

Some are mere truisms, such as: "Wise leadership is more essential to successful operation than extensive organization or perfect equipment"; or, "Anticipating repairs and replacements prevents interruption due to bad order or broken down equipment."

Some are precepts, or rules of good conduct, such as, "Basic time on standardized jobs should never be changed except in those cases where a substantial change has previously been made in conditions, methods or equipment."

Some, on the other hand, are generalizations of the scientific sort from a mass of data, such as, "Within practical limits the times required by all expert workers to perform time fundamental motions are constant." Or this familiar economic proposition, "Wages tend to lower when the supply of labor exceeds the demand."

Perhaps the genuinely valuable generalizations should have been sifted out from this otherwise quite interesting collection of the maxims and observations of experienced business men and engineers. It is disconcerting to have every shrewd observation raised to the dignity of a law.

With these reservations, Mr. Alford's book may be recommended as a rapid and competent survey of first-class current practice in American industrial management. And doubtless Mr. Alford would be particularly pleased if economists (whom he suspects as being academic and given to speaking in words of no exact quantitative value) would read chapter XII, wherein he develops under the title "Laws of Economy" certain exact formulæ for estimating, for example, the quantity to be purchased to make total unit cost a minimum, or, again, the precise economy of labor-saving equipment. In some ways, this is the most interesting chapter in an interesting and instructive book.

J. A. ESTEY.

Purdue University.

LAWRENCE, JOSEPH STAGG. *Wall Street and Washington*. Pp. 457. Princeton: Princeton University Press, 1929. $5.00.

Stock market speculators have found an ardent champion of their cause in the author of this vehement attack on recent Federal Reserve Board chastisements and Congressional effusions directed against Wall Street from Washington. In a daring and unconventional manner the widely prevalent belief as to excessive brokers' loans and dangers of genreal credit inflation are branded as so many popular myths, and the Federal Reserve Board is severely arraigned for apparently creating the very conditions which it is seeking to correct.

In view of recent developments on the securities markets of the country there might be some disagreement with the author that "the investor and the professional speculator are infinitely better informed today than they were a generation ago and emotional typhoons are at least less probable now than they have been at any time in the past" (p. 151). The author has opened up a new field for lucrative speculation as to what might have happened if his proposal to amend the Federal Reserve Act so as to permit rediscounting of bills secured by stock market collateral had become a reality. Perhaps the "emotional typhoons" would then have become supersensational cyclones, if we may be permitted to encroach a little on the author's bombastic and vigorous method of expression. At all events, in spite of the imputed intelligence and keen analytical powers of the American investors and speculators, this type of speculation would not be quite so hazardous as stock market speculation.

KARL SCHOLZ.

University of Pennsylvania.

SLOAN, LAURENCE H. *Corporation Profits*. Pp. ix, 365. New York: Harper and Brothers, 1929.

Mr. Sloan, who is Managing Editor of the Standard Statistics Company, has turned freely to the records and statistical staff of his organization to produce in this book an unusually comprehensive survey. It is an analysis of the balance-sheets and income statements of 545 leading industrial companies for the two years, 1926 and 1927. The information of this list of companies is analyzed by individual companies (and especially the leaders and the laggards), by groups of companies representing types of industry and, through a composite income account and a composite balance-sheet, by totals for the entire group. Anyone familiar with the wide variety of financial statements given out by industrial corporations for *public* use will realize the size of the task undertaken in this study.

By grouping the data according to type of industry and for the entire group, averages were obtained which the author set up as general standards—points of departure—to be used in further analyzing individual companies. The leaders in each field of enterprise were then judged by each of several tests, such as the ratio of net profits to gross income, the absolute size of the companies judged by total assets, earnings and payments to security owners. A point of particular interest developed by these tests was the direct relation of size and leadership in a particular field and net profits.

While this book is written in a popular rather than formal, footnoted style, it is a stimulating piece of original research. It covers, however, only two years, and thus constitutes nothing more than a glimpse. One wishes for a dozen more years and an annual continuation.

Mr. Sloan stresses repeatedly the need of more adequate data, both in accuracy and completeness, from our leading industrial corporations, the thesis so admirably developed by Professor Ripley.

G. WRIGHT HOFFMAN.

University of Pennsylvania.

STEINER, W. H. *Investment Trusts: American Experience*. Pp. 325. New York: Adelphi Company, 1929.

This is a study of a financial development as it is rather than as it ought to be. The author is much more interested in describing investment trusts as they are than in developing any single "ideal" type of trust. But in developing his material he has gone considerably beyond a mere description of forms. Thus, the usual corporate trust in which the public supplies the bulk of the funds which the trust operates is in practically every instance a case of trading on the equity by the organizer-manager in which prospective profits, if realized, redound to the common stock holders. In contrast, in the fund type trust the salient characteristic is that the organizer-managers receive a fee for service in setting the plan up and overseeing its operation. Frequently this fee is in the form of an initial "spread" in the original sale price of the shares, and thus the management is paid in advance for services to be rendered for years to come. These fundamental differences, together with numerous points of lesser significance, are repeatedly illustrated in Dr. Steiner's development of the investment trust movement in this country.

At certain points the author's analysis reveals unusual insight into current investment trust development. He describes the late Summer and Fall of 1928 (the time of writing) as the beginning of a period of testing. "Faced with a clientele of investors whose hopes were raised to a high pitch in a wave of speculative enthusiasm, they are asked to fulfill these expectations in a securities market whose tone is irregular and extremely sensitive and which is often regarded as high." This statement assumes double force in the light of the phenomenal growth of investment trusts during the Summer of 1929 and the recent market slump. Although of comparatively small proportions, this book deserves a prominent place in investment trust literature.

G. WRIGHT HOFFMAN.

University of Pennsylvania.

BABCOCK, DONALD C. *Man and Social Achievement*. Pp. xi, 546. New York: Longmans, Green and Company, 1929. $3.00.

This is an orientation book which interprets the career of man with respect to the development of the essential institutions of society. The author's general method is to display modern social institutions against primitive forms, "leaving the intervening development to be inferred" (p. ix). The bare enumeration of many examples of analogous social developments serves to fill the gaps in the historical treatment.

In brief, the twenty-five chapters of the book cover such topics as the evolution of man, his unique specializations, his inherited equipment for life, the environment as an influence upon his behavior, and the development of such general social forms as industry, the state, warfare, the home, morals, art and religion. The author describes these social forms as behavior patterns shaped under given conditions of life and transmitted to individuals under various compulsions of social controls. In the final chapter he calls upon the student to pass judgment upon the social structure to which he has fallen heir. Indeed, it is the author's hope that his book will contribute something to the shaping of that new morality which is being evolved under the stresses of modern life.

For a book dealing with social evolution, the work lacks at least two main divisions: first, a treatment of the process by which men create social forms; and second, a discussion of the various types of social integration. One searches in vain for paragraphs dealing with social contacts and interstimulation, the basic social factors. In the same way one fails to find any mention of social stratification and social

classes; especially does one miss a view of society as an aggregate of interest groups. On the other hand, no book of a similar type is known to the present reviewer which so ably describes the significance of the specialization of social types, particularly the sailor and the tradesman. In the main, the book is adequate to its purpose and written at the level of those who are to study it.

RALPH E. TURNER.
University of Pittsburgh.

BOWERS, CLAUDE G. *The Tragic Era.* Pp. xxii, 567. Boston: Houghton Mifflin Company, 1929. $5.00.

In *The Tragic Era,* Claude G. Bowers has shown the same rare talent for energizing the stale bones of history which made *Jefferson and Hamilton* so memorable a book. This panorama of the decade from 1865 to 1876, a period as little known and discreditable as any we have passed through, is especially noteworthy for its trenchant vindication of Andrew Johnson and its shrewd portrait of Thaddeus Stevens, the hard-boiled Lancastrian whose influence on the course of our affairs has been so inadequately understood.

Yet the work is better literature than history. It is laboriously documented; but the documentation has often been used, I am afraid, in most unprofessional and disingenuous ways. Mr. Bowers disqualifies himself from the outset for any judicial rôle by his intense and frank conviction that the Republican Administrations which guided the country after the Civil War were wholly corrupt, unscrupulous and incapable of a single patriotic act. By all the arts of the special pleader he sets about to win his audience; and without actual falsehood, by inference and emphasis, by magnifying the trustworthiness of his own witnesses and vilifying the opposition, he creates a picture subtly but fatally distorted. He reminds me of the old lady whose solitaire somehow always comes out; but whose conscience is clear because she has never insinuated an extra ace into the deck.

Without question, the North was dreadfully mistaken in its post-war policies; yet this didn't mean, as Bowers makes it mean, that every Union man advocated them for an unworthy purpose. Nor did it prove the Southern leaders, to a man, fit candidates for the Table Round. In the glorification of such romantic windbags as Lamar and Vance, wholly in the tradition of those flag-waving demagogues who have always been the bane of Southern politics, followers of Yancey and Brooks, predecessors of Ben Tillman and Tom Heflin, Bowers most clearly reveals his dangerous bias. The carpet-baggers were unbearable; yet the men they oppressed did not turn the other cheek with quite such saintly unanimity as we are led to believe. Tilden was robbed of the presidency, it is true; but still he wasn't the timid and unworldly eremite that Bowers makes him out to be. Ben Butler, Wade, Zachariah Chandler and the other Republican leaders were as unsavory a collection of politicians as any party ever managed to gather; yet the Democrats were not on that account guided solely by the Golden Rule and a faith in fairy godmothers.

Here is a book to be read and enjoyed, to be valued for its wide learning and fine writing. But do not trust it too implicitly.

ALPHONSE B. MILLER.

BURR, WALTER. *Small Towns: An Estimate of Their Trade and Culture.* Pp. x, 267. New York: The Macmillan Company, 1929. $2.50.

In this volume, Professor Burr has brought together in a series of non-technical papers his observations and conclusions about rural life in the United States. The scope of the work is broader than the title might indicate, since the author deals as much with general farm problems as with specific conditions in small towns. After briefly tracing the origin and development of the American rural community he discusses such developments as the urbanization of country people and the tendency toward the enlargement of the average rural community. He then comments upon trade, education, government, the church, and so forth, in these rural communities.

Contrary to the generally accepted view, Professor Burr is highly optimistic about the outlook of American agriculture. Of course, he realizes that this attitude is at variance with the opinion generally prevailing, but feels that: "One difficulty with the literature and even so-called scientific findings presented in the past few years concerning the mental and social status of the farmer, is that those who presented it assumed that a trend noticed at the time would continue and even be accentuated; whereas apparently what really was happening was that those who were subnormal and inefficient were being made noticeable by the very impossibility of their position. The picture is rapidly changing, and some of those who are talking about rural decadence will no doubt still be sobbing aloud in public places long after conditions are so changed, that while they think they are weeping over the ills of the living, they will actually be like the senile old woman who puts in her time crying over her photograph album containing the pictures of the dead" (p. 42).

Continuing in this vein, the author says: "The business of farming has passed its crisis and is entering a period of sound prosperity. This means there is beginning to be noted an upward trend in farm buying power. Other things being equal, this trend should continue for a number of years. This means new money for those who have finished products to sell to farm folks" (p. 136).

One can sincerely hope that Professor Burr is correct, but unfortunately the facts presented are not convincing. Throughout the book, the evidence is based largely upon the personal field observations of the author who for many years was director of the Rural Service Department of the Kansas State Agricultural College. His studies and contacts have been confined chiefly to the Middle West, particularly to Kansas, which is one of the most wealthy and prosperous farming states in the Union. The 1925 Census of Agriculture revealed that the value of all farm property in that commonwealth was fifteen thousand dollars to a farm, compared with a national average of nine thousand dollars. Obviously, conditions in Kansas are not typical of the country as a whole, yet most of the author's deductions are based upon facts and figures for this unusually prosperous area.

An analysis of national figures for the year 1927–1928, made by Mr. Virgil Jordan, Chief Economist of the National Industrial Conference Board, comes to the conclusion that in that year agriculture as a whole "fell short by more than five billion dollars of paying its way as a going concern." As long as such conditions persist, it seems too early to claim that American agriculture is "entering a period of sound prosperity."

C. LUTHER FRY.
Institute of Social and Religious Research.

BARNES, HARRY ELMER. *Living in the Twentieth Century.* Pp. xviii, 392. Indianapolis: The Bobbs-Merrill Company, 1928. $3.50.

Professor Barnes writes, as always, wittily and intelligently. His purpose is to "set forth in clear and popular form those transformations in our knowledge and material culture which separate our days so completely from the age of Jackson or Lincoln." He asserts that greater changes have occurred in the last one hundred years than took place in many previous centuries. He sets out to enumerate them and to account for their manner of coming about. He discusses scientific, mechanistic and cultural advances.

The book is excellent as a survey of general conditions, although it must naturally be sketchy in its treatment of each specific phase. The lay reader will find it absorbingly interesting; the scholar should be glad to know the significant movements in fields other than his own.

The width of Mr. Barnes' reading is immediately evident. The book, however, is only occasionally documented, but the author appends a lengthy reference bibliography to each chapter.

DOUGLAS L. HUNT.
Birmingham-Southern College.

DUNKMANN, D. KARL. *Angewandte Soziologie, Probleme und Aufgaben mit besonderer Berücksichtigung der Pädagogik, Ökonomik und Politik.* Pp. 160. Berlin: Reimar Hobbing Verlag, 1929. M.8.

This volume, an attempt to provide "applied sociology" with a theoretical basis, is the work of a man who for many years has been active in German social

politics and social amelioration. It is remarkably clear and direct, and is almost entirely without the academic exhibitionism so often practised under the mask of "German thoroughness."

In spite of all this, the book has little value for American social technologists. The "applied sociology" delirium has noticeably waned in the United States in recent years; in Germany, apparently, it is just getting under way.

Those interested in social theory might find the book of some value for its lively, if not convincing, attack on sociologists who refrain from value-judgments, and for its "sociological imperative," intended to take the place of the categorical imperative.

In general, it is a mixture of ethics, exhortation and sociologizing.

HOWARD P. BECKER.

University of Pennsylvania.

YOUNG, C. WALTER. *The International Relations of Manchuria.* Pp. xxx, 307. Chicago: University of Chicago Press, 1929. $3.50.

Prepared as one of the "data papers" for the third conference of the Institute of Pacific Affairs, this volume gives a digest and analysis of treaties, agreements and negotiations concerning the Three Eastern Provinces of China. It provides a background of information necessary for the understanding of the issues that reached a critical stage in the recent armed conflicts at the terminals of the Chinese Eastern Railway. The author, reticent as to his own judgments, is carrying out the Institute's policy of preparing the way for fruitful negotiation by a fair and lucid display of all the interests at stake. After an introductory essay, briefly sketching the events that led up to the incidents reported in the last few months, he gives an account of half a century's struggle for the control of power in Manchuria, a struggle in which economic and political objectives were so closely intertwined that even fairly well informed students may find it difficult to disentangle motives. Instead of attempting a separate discussion of the issues, which would necessarily be a somewhat artificial arrangement since they hardly ever appear singly, the account is divided roughly into four chronological periods within each of which a new note seems to dominate the complex situation. The period from 1895 to 1905, a decade largely of financial organization and bartering for concessions, is illumined by the American enunciation of the "open door" policy. The period from 1905 to 1915 is one of development—organization of the South Manchuria Railway; mining, lumbering and cable agreements; loans and syndicates. The period from 1915 to 1921, reflecting the European war, is one largely of political realignments, strengthening Japan's position in Manchuria, and recommitments of the Powers to the "open door" policy in Manchuria. The fourth period, from 1921 to 1929, overshadowed by the Washington Conference, sees the sharpening of conflict between China and Russia and Japan respectively, but also new agreements, and a new interest of the other Powers in a Manchurian policy of open access to all.

Here, then, we have the story, clearly told—if sometimes for the general reader too much in the severe terminology of official diplomacy—a story authenticated by reference to original sources in every particular, but also giving evidence of the author's thorough grasp of the multitude of concrete problems involved, as observed by him on the spot. The book is recommended by some of our best American authorities as a reliable guide through the mazes of the present struggle in and about Manchuria. Every editor of foreign news and every teacher of current history will feel safer in his interpretations of coming events in this disturbed region after consulting a book which is factual, impartial and arranged for easy reference.

BRUNO LASKER.

The Inquiry,
New York City.

DUNN, FREDERICK SHERWOOD. *The Practice and Procedure of International Conferences.* Pp. 229. Baltimore: The Johns Hopkins Press, 1929. $2.50.

The conference method of dealing with problems of international scope has become a characteristic of contemporary diplomacy. Its use is increasing yearly, both in breadth of range and frequency. There can be no doubt of the great contribution toward international peace and understanding which is being made by this procedure and it is timely and appropriate that this volume has been published. The author is primarily concerned with reviewing the history of the development of the international conference as an instrument of diplomacy although the concluding chapter, "Summary of Current Practice," provides an excellent survey for the benefit of those concerned with the minutia of detail.

W. LEON GODSHALL.

Union College.

VANCE, RUPERT B. *Human Factors in Cotton Culture: A Study in the Social Geography of the American South.* Pp. xi, 346. Chapel Hill: University of North Carolina Press, 1929. $3.00.

Cotton has impinged upon the cultural patterns of the South by giving the small cotton grower a shifting standard of living and preventing him from acquiring habits of thrift because of the seasonal and cyclical nature of the attendant money income. The workers are born into a poverty that created them ignorant and their ignorance keeps them poor. Thus, while the economic and geographic factors have exerted great influences on the production of cotton, that commodity has in turn produced a culture that is peculiar to the cotton belts.

Industry could not survive under the conditions governing the production of cotton. Because it requires so large an amount of cheap labor for its cultivation the relation of that labor to cotton and to the community is important; and increasingly so as the product has defied mechanical harvesting. Cotton fails because of the differential costs of production, yet continues to be produced with inefficient methods. The interdependence of living, the hazards and risks of production, the lack of diversification and the cotton culture "complex" have combined to make an escape from the vicious circle almost impossible.

While the future of the small cotton farmer is precarious, there is hope in the perfection of a mechanical picker and the extension of cotton culture in the Western states. It is doubtful, however, if cotton farmers ever will be able to provide against their two greatest risks: the hazards of crop failures and the hazards of fluctuating prices.

IRA DE A. REID.

National Urban League.

BRYANT, A. T. *Olden Times in Zululand and Natal.* Pp. xxi, 710. New York: Longmans, Green and Company, 1929. $5.00.

This volume, described as "Part I of a complete work on the Early History of the Eastern-Nguni Bantu," is a detailed study of the political intrigue which surrounded the rise of the famous Zulu empire under the leadership of the picturesque king, variously called Chaka, Tchaka, and, in this work, Shaka. It is apparent that Reverend Bryant has gone deeply into his subject, and he tells us in his preface that he arrived in Natal in 1883, and spent the succeeding forty years in close association with the people of whom he writes.

Certainly he has given us an unusual book. In the main, it is rather a history of the Zulu clans, and an account of their political relations with the peoples who surrounded them, during the reign of their famous king. We have here the result of much research into the early historical sources which record the first contacts of the southeastern Bantu with the Whites, and there is also a liberal reference to native tradition, which, it may be said, Mr. Bryant does not accept except as consensus, and without as careful checking as is possible.

It is the detail of the book, the result of the closeness of the author to his problem, that makes it as difficult as it is to follow. That might be expected, however, for political history, whether among primitive or civilized man, is not light reading, and when one comes to patterns of behavior as different from the background of the reader as are those of which Mr. Bryant treats, it is not strange that the result is a book to be studied rather than read. It is, however, unnecessarily involved, it seems to me, because of the manner in which the author presents native names. It is quite true that Bantu linguistic usage is based on prefixes, but I cannot see why a name such

as iziBisi should not be written as Izibisi, or Izi-bisi, and thus not affront the eye accustomed to English usage. Technically, the note on phonetics is much too brief; all the diacritical marks are not accounted for, and, if Mr. Bryant intended his orthography to be exact, why are we left entirely without information as to the place of the "clicks" in the pronunciation of the names he gives? Then, too, the inclusion of entire pages of Zulu text (as on pp. 69–70) with no translation, does not add to the enlightenment of the reader.

At the same time, one must not cavil at details such as this. The involved character of the data must be blamed for the involved nature of the result, and we must be grateful for the recognition that tribal history is as worth the study as that of the predatory Dutch, Portuguese and English who overran the land and despoiled the natives. Certainly, no one can read this book and not come away impressed with the political genius of the Zulu and his neighbors. That this love of intrigue constitutes one of the outstanding facets of African culture no one familiar with native life has failed to recognize, and it is to be hoped that this work will encourage some of the Africanists working in other parts of the continent to do the same sort of study for native empires in other regions of Africa.

MELVILLE J. HERSKOVITS.
Northwestern University.

SALTER, J. T. *The Non-Partisan Ballot in Certain Pennsylvania Cities.* Pp. xv, 257. Norman, Oklahoma: The Transcript Press, 1928. $1.50.

This is an intensive study of the effects of the non-partisan ballot in the election of councilmen, mayors and controllers in Pennsylvania third-class Commission government cities during 1913, 1915 and 1917. Comparison is made with elections in the same cities in 1919, 1921 and 1923, after the partisan ballot had been restored.

It is a field study. Dr. Salter ably seeks by objective, scientific method to reduce political phenomena to a quantitative basis, after the best modern manner, and he succeeds as well as could be expected. Political scientists may be both disappointed and encouraged by the content of the book. The disappointment is not the author's fault; it lies in the refractory character of the materials, which almost prevents positive determination of the merit of a relatively simple political device. It will not be easy to reduce politics to formula. One is enabled to see, however, that with adequate resources—more comprehensive records which are entirely within the range of possibility—some laws of political motion may be determined.

Dr. Salter presents (pp. 32–145) in a long chapter on "opinion as to the Non-Partisan Primary and Election," the reactions of elected official, defeated candidate, party organization, press and chamber of commerce. In succeeding chapters he examines the character of officials in both periods, the interest of the voter, campaign expenses, partisanship and the presentation of issues. On some of these matters he can speak with greater confidence than upon others. The interest of the voter was not lessened by the non-partisan ballot; the officials nominated and elected by it were probably superior in education, occupation and wealth to those attaining office upon the partisan ballot; and, quite definitely, issues can be most squarely presented to the electorate in a non-partisan contest." He concludes that the non-partisan ballot provision should not have been repealed on the basis of any evidence which his investigation reveals.

RALPH S. BOOTS.
University of Pittsburgh.

JEANS, SIR JAMES. *The Universe Around Us.* Pp. x, 341. New York: The Macmillan Company, 1929. $4.50.

The Universe Around Us, by Sir James Jeans, is the latest addition to the remarkable books recently published by a group of English astronomers whose reputation is deservedly world-wide. No book has more brilliantly succeeded in setting forth in lucid style the recent discoveries and theories of astronony, particularly from the astrophysical standpoint. The style and language are always clear and the reader is fascinated by the skill with which Jeans describes the most difficult topics in a way intelligible to any educated person. He avoids mathematical demonstrations, generally by using analogies in their stead.

The one point that deserves serious criticism is the studied refusal to give Chamberlin and Moulton credit for the Planetesimal Hypothesis which is the obvious parent to the one offered by Jeans himself. Also, in common with many scientists, the author seems a little too sure, in some cases, that his reasoning is infallible and the results therefore permanent. Recent changes in scientific viewpoints scarcely make such an attitude a safe one.

CHARLES P. OLIVIER.
University of Pennsylvania.

FISHER, LILLIAN E. *The Intendant System in Spanish America.* Pp. x, 385. Berkeley: University of California Press, 1929.

After two centuries and a half, the Spanish Government concluded that its system of Colonial administration must be reformed, so it inaugurated a new system of intendancies designed to relieve the viceroys and captains-general by adding new officials to share the burden. Whether the system was much improvement is a matter of debate; presumably it was inaugurated too late. Nearly three-quarters of the book is devoted to a translation of the voluminous ordinance of intendants for New Spain.

ROY F. NICHOLS.
University of Pennsylvania.

SIMPSON, LESLEY BYRD. *The Encomienda in New Spain: Forced Native Labor in the Spanish Colonies, 1492–1550.* Pp. 297. Berkeley: University of California Press, 1929. $3.50. (University of California Publications in History, vol. 19.)

This is a lucid and revealing resumé of the contents of documents so far available affording data on the history of forced labor in the West Indies and Mexico in their first decades. No sociological or economic historical analyses are attempted, nor does the writer relate the facts to the setting. All in all, the paper is a useful guide to the literature of the subject.

W. C. MACLEOD.
University of Pennsylvania.

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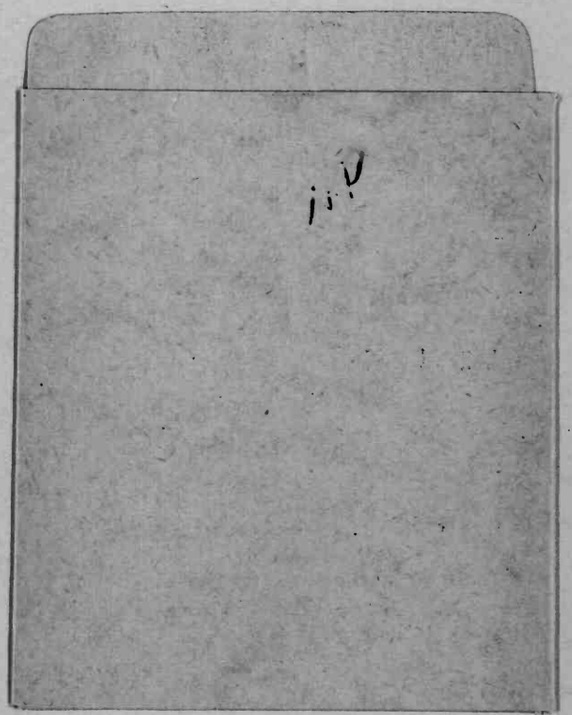

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